2008

Aaron L. Helbach v. State of Utah et. al. : Brief of Appellant

Utah Court of Appeals

Mark Shurtleff; Utah Attorney General; Brett Delporto; Assistant Attorney General.
Amon L. Helbach.

In The Utah Court of Appeals

Aaron L. Helbach Appellant -v- State of Utah et. Al. Appellees	Case # 20080951-CA

Appellants opening Brief

Aaron L. Helbach
34774 - A2
PO Box 550
Gunnison Utah
84634

Mark Shurtleff
Utah Attorney
Brett Delporto
Assistant Attorney General
160 E. 300 S. 6th FL
PO Box 140854
Salt Lake City Utah
84114-0854

Table of Contents

Table of authorities

Table of Authorities (cont)

Rules

Constitutional Provisions

Table of Authorities (cont)

	Page
Constitutional Provisions (cont)	
Utah	
Art I § 7	6, 8, 13
Art I § 12	8
Art I § 14	14
Statutes	
§ 77-13-6 (U.C.A As Amended)	10, 12, 14, 16, 17
§ 77-15-5 (U.C.A. As Amended)	25
§ 77-18-4 (U.C.A. As Amended)	11
§ 77-32-1 (U.C.A As Amended)	8, 16
§ 78-35a-105 (U.C.A. As Amended)	28
28 U.S.C.A § 2254 (In passim)	28
28 U.S.C.A § 2243 (In passim)	29
Exhibits	
Ex. 1 Ruling and order 5/18/06	
Ex. 2 order of dismissal 6/13/08	
Ex. 3 mental health Records	
Ex. 4 Annette Colemans Statement about Appellants Pills	
Ex. 5 Plea Agreement	
Ex. 6 Change of Plea transcripts	
Ex. 7 Statutes and Rules	

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Jurisdiction

This court has Jurisdiction to hear this case pursuant to § 78A-4 (Habeas §) (U.C.A. 2008).

Statement of Issues/Standard of Review

Issue 1: "Did the district Court err in dismissing The petition when the issues were meritorious and supported by fact and Law?"

Determinative Law: Adams v. State 2005 ut. 62 ¶8 N.1, U.R.Cr.P. Rule 11; Rule 24(a) and Rule 30(a),

Standard of Review: Review is for correctness giving no deference to the conclusions of Law from the trial Court

Issue 2: "Did the Court err in failing to hold an evidentiary hearing when one was needed to develope the facts on the issues the Court said had merit."

Determinative Law: Rule 65C.(J)(1)-(3); Platts v. Parents helping Parents 947 P2d 658, 661 (ut 1997); Adams ¶8; Munson v. Carver 928 P2d 1017, 1023 (ut 1996).

Standard of Review: Review is for correctness and Applying such as a de Novo standard of Review giving no deference to the trial courts actions.

Constitutional or Statutory Provisions

All statutory or Constitutional are either set forth in the text of this brief and or are set forth in the addendum.

Statement of the Case and Facts

Appellant filed a timely Rule 65 C petition on or about 8/12/2005, 11 months after his conviction.

On 9/19/2005 the court summarily dismissed the petition claiming it had no merit, this without serving the state.

On or about 12/30/2005 the Appellant filed a Motion to Vacate the dismissal, which after a lengthy time, the court Granted and Reinstated the petition and in doing so, ordered the Appellant to present his case on about 8 or so issues the court said were meritorious. See Ex 1 Ruling and order

The State Responded, and the Court, after the Appellant responded to the State, subsequently dismissed the case again and in doing so, it disregarded Case Law From this State and courts of higher Rank. See Ex 2 - order of dismissal [redacted]

The Petition involved trial court errors that occurred during Appellants trial court proceedings which involved several issues involved in issue one of this brief and that the main reasons that the conviction and plea were obtained were because of an unconstitutionally obtained confession; Appellants provable mental health issues; The courts procedurally incorrect plea colloquy and incorporation of the plea affidavit into the Record and Appellants grossly inadequate Representation by Counsel, as set forth herein, among other things.

Though this whole proceeding he has had to Rely on help from other inmates because he cannot obtain counsel therefore Liberal Construction is pled by Appellant.

Summary of Argument

Appellant relys heavily on the reasoning of the Utah Supreme Court in Adams v State 2005 Ut 62, to show error on the trial Courts part in wrongfully denying the petition when the facts and Law support Relief.

Adams makes it inexcusably clear that If a petitioner bears the burden of pointing to sufficient factual evidence OR Legal Authority to support a conclusion of meritoriousness which is the basic theory of obtaining an evidentiary hearing on habeas Relief (even [redacted] of timeliness, which is not an issue on this case), that conclusion is based on another theory that is also supportive based in Criminal Rules.

Our Supreme Court said in Adams 2005 Ut 62 ¶11 Fn 1 That;

> "We note that post conviction Relief is sought in a civil proceeding . . . . . Rule 24(a) states That "the court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of Justice if there is any error or impropriety which had a substantial Adverse effect upon the rights of a party". U.R.Cr.P. Rule 24(a). (Emphasis added). We have stated that such a Rule is an overall expression of the need to rectify any error or impropriety in the trial process that significantly impacted a defendants rights". see St v Maestas 2002 Ut 123, ¶54, 63 P3d 621.

This goes hand and hand with U.R.Cr.P. Rule 30(a) and St v Mora 2003 Ut App. 117, 69 P3d 838 (Analizing Rule 30(a) in the context of a guilty plea), St v Breckenridge 688 P2d 440 (Ut 1984).

Futher St v Hollands 876 P2d 357 (Ut 1994) discourse on Ineffective Counsel provides the "need to rectify" Justification based on the facts presented to warrant an evidentiary hearing in this case because there is no evidence to provide a factual basis for the plea

This case presents some fairly unique situations that are unusual circumstances, coupled with those normally viewed as habeas issues, that makes it unconscionable not to Re-examine the conviction Dunn v Cook 791 P2d 873 (Ut 1990) Gallegos v Turner 17 ut 2d 273, 409 P2d 386 (1965). See also Stewart v State 830 P2d 306 (Ut App 1992) Casida v Roland 866 P2d 599 (Ut App 1993). (such circumstances exists when there is a substantial likelihood that had certain evidence been available at the time of trial, a different verdict would have resulted).

The district Court failed to handle the case correctly overall and this Court should Reverse and remand for an evidentiary hearing.

Arguments

Issue I: The district Court erred in dismissing the Petition when the issues were meritorious and supported by Fact and Law."

The district Court failed to conduct the proceedings in this case properly because the claims do not meet U.R.C.P. Rule 65C (g)(2)(A)(B)(C) definition of Frivilous on its face, because the facts support a claim for Relief as a matter of Law; the claims have an arguable basis in fact and Law; and the claims prove manifest injustice.

A. Lets start with Ineffective Counsel. Appellants Counsel John Caine completely failed in many areas to mount an effective defense as follows;

1. Counsel failed to properly investigate the plea bargain.
2. Counsel failed to investigate and prepare a defense.
3. Counsel failed to conduct Formal discovery (Independant).
4. Counsel failed to move for a competency hearing before his client pled guilty and failed to make an independent investigation, his own investigation looking into alibis and factual scenios of the cases, into the weber County confessions, confession tactics used, and investigations into client

[redacted]

mental history. See [redacted] Ex. 3

(5) Failed to investigate inconsistant statements made by co-defendents or explore [redacted] motives to implicate me.

(6) Failed to explore alibis.

(7) Failed to move for a line-up or to suppress incompetent confession.

(8) Failed to conduct an independent investigation into Weber County crimes to see if they were supported by probable cause and had an evidentiary and factual basis.

(9) Failed to ensure that a competency evaluation was conducted that confirmed to §77-15 et seq; one performed by DHS, not the State Prison and one not based on the premise of drug addiction problems, but one conducted by DHS professionals in the specific field of mental health, not UDC, which is an agency of the prosecution.

(10) Failed to ensure that the dictates of Rule 11 were strictly complied with by the court and himself. [redacted]

(11) Counsel's ill advise led me to enter an involuntary, unintelligent, and unknowing [redacted] guilty plea

(12) Failed to investigate affirmative defenses, criminal culpability, mental illnesses, or diminished capacity defences.

(13) Relied on Davis County Public Defender William Albright's investigation even though we said he disagreed with his strategy and said he (Albright) was not a good attorney, and that's the truth. The only truth Caine told me.

(14) In the record, Caine talked the judge out of a proper competency evaluation on 5/19/03 Tape # D051903.

(15) Caine knew of my two suicide attempts while in the Davis County Jail; my discharge from the Army for mental illness and my prior history, failed To Assert This defense vigorously.

(16) Caine failed to investigate and interview witnesses or request expert witnesses on [redacted] mental Health or CST personel and any other type of expert needed to prove my innocence, that I was incompetent to confess, plead guilty or have criminal culpability and to investigate the motive of the past legal history and guilt

[redacted]

of codefendants, as well as the investigations of the police and my alibi witnesses. Strickland v. Burns 4 P3d 795 (Ut 2000)

(17) He failed to argue the defense of evidence tampering on the night of 3/5/03. On that night, I was at my cousin Kristy Jackman's apartment on 27th & Quincy in Ogden, UT. The police claim they searched Sherry Hansen's shed that night and found no weapons. However, on the morning of 3/6/03, Sherry searched her shed and found a handgun. This was a police report caine refused to give to me when requested under U. R. Prof. C. Rule 1.16(d).

(18) Counsel refused to call on Ashley Tremelling to testify about the scandalous nature of codefendants, Daisha Coleman & Matthew Clark, or the problems with the Mexican mafia. Members of the Mexican mafia robbed these stores and that's why some of the descriptions alleged hispanic males about my size.

(19) I knew this. I had had problems with the Mexican mafia over drugs and other problems family in nature. In late Nov. 2002, I was stabbed by them and had to go to Ogden Regional ~~Hospital~~ medical center for stitches, and I went to Davis North Hospital in early Feb. 2003 for housed bones and pulled tendons from being beaten with a baseball bat. Both Davis & Weber Co. attorneys (defense) failed to investigate this compulsion defense. Being mentally ill, terrified, and suffering from methamphetamine psychosis were affirmative defenses that should have been raised but were not.

(20) Counsel failed to identify with me and my case, depriving me of fundamental fairness under both Due Process clauses, Art 1&7 and 14th Amend.

(21) Counsel failed to raise and investigate the fact that the Weber County detective who interviewed me brought a newspaper clipping from the robbery. My picture was circled. He stated that a store clerk who worked at that station in 2001 said that I was the assailant who beat him badly in Sept. 2001. I looked at the surveillance photos, and it did look exactly like me. The assailant had the same height, weight, and build, and even the same facial features as me. It could not have been me, however, because I was at Fort Leonard Wood, MO

[redacted] until Oct 3, 2001, during Basic Training, when I got discharged from the Army because of mental illness that existed prior to service. (EDTS). See ex Attached Documents

(22) So, there are two of me out there, and I believe they used this as probable cause against me. But I was not investigated and defended by caine, we knew all this. As I previously stated, there was a charge that I confessed to in Davis County that it was proven by conflicting physical evidence not to be me. Think about it. This is not only ineffective counsel, but also prosecutorial misconduct.

(23) It is well settled that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. John caine failed to investigate ANY of these issues. This is unreasonable and renders counsel's performance constitutionally deficient. Had he made any effort to defend my rights, the outcome of my proceedings would have been greatly affected

(24) A good overall reputation of a particular attorney is no substitute for a careful inquiry by a court since there is no guaranty that even an excellent attorney, especially a busy one, has not botched a particular case, as in this case. This observation of a Utah reviewing court hits the nail on the head

(25) Perhaps the most blatant act of ineffective assistance performed by caine was when I explained to him the robbery in Davis County (03-1585), Clearfield City, where I confessed to, and was booked into jail for, but was not prosecuted for because my shoe did not match the shoeprint left by the assailant. That shoeprint was the only physical evidence they had.

(26) Keep in mind that the confessions to the Weber County robberies came from the same audiotape as the Davis county confessions. Para 25 is very relevant because it was proven that I had admitted to a crime I was not guilty of. Mr. Caine told me this issue was irrelevant. He failed to investigate the

[redacted]

the matter any further.

I have several witnesses that can attest to not only my character, but to the shady nature of my codefendants my attorney ignored me when I brought these alibis and character witnesses into light.

The U.S. Supreme Court as well as this court in Strickland v Washington 466 U.S. 668, 688, 692 (1984) McMann v. Richardson 397 U.S. 759, 771, N 14 (1970) Cuyler v Sullivan 446 U.S. 335, 344 (1980) ST v Templin 805 P2d 182, 188 (UT 1990) Kruger v Turner 479 P2d 477, 480 (UT 1971) Alires v Turner 449 P2d 241, 243 (UT 1969) have all stated that;

A. Counsels duty is to advocate his clients cause.
B. Avoid conflicts of interest.
C. Keep defendant informed of important developments
D. Investigate and prepare defenses
E. Investigate plea agreements
F. Ensure that his clients interests and rights are protected.
G. One who accepts responsibility for his representation.
H. Avoids interference with the state.
I. Subject prosecutions case to adversarial testing.

These are just a few affirmative duties of counsel, none of which were responsibly performed by John Caine.

The representation was a sham or pretense, an appearance in the record by an attorney who manifested no real concern for my interests and had no willingness to identify himself with my case

This is evidenced by the undisputable facts that he failed to have a proper competency hearing, the other issues raised herein, and his total lack of independent investigations compromised my rights under §77-32-1 (as previously numbered) Art 1§ 7 and 12, U.S.C.A 6th and 14th Amend. and U.R.P.C. Rules 1.1, 1.2, 1.3, 1.4, 3.3, 3.4, 3.5, 8.4 and any other provisions in law that supports these issues which I have a right to expect that my rights will be protected by counsel, the prosecution and court. They were not.

B. The Guilty Plea:

The failure to determine competency and other issues involving due process render the Guilty plea infirm procedurally and constitutionally.

Constitutional concerns underlying plea agreements courts will allow a defendant to withdraw a plea when a defendant entered into the plea agreement unknowingly and involuntary. Salazar v Warden 852 Pzd 998, 992 (Cir 1993), St v Stillings (discussing Constitutional and procedural Requirements of plea-taking proceedings and stating such proceedings "are intended to insure that a defendant who pleads Guilty Knowingly and voluntarily waives the protections the Constitution guarantees him or her prior to a trial verdict).

The appellant does not understand why its so hard to get the State Courts to Rule consistently with higher Court opinions. You cannot Rule consistently with your own opinions. Read St v Holland 921 Pzd 430 (Cir 1996). Hollands case is not like this one but the mental illnesses in this case are more serious, and are provable plus the Appellant was discharged from the U.S. Army because of mental illness and in this case the court determined I was competent without a hearing or Evaluation conducted by experts trained in mental health.

Therefore the reasons the plea is procedurally and constitutionally infirm are listed below:

① The Court failed to determine competency and there was sufficient evidence to warrant a competency evaluation.

② The Court failed to determine if the confession was Legal and/or a product of one incompetent to make one.

③ The Plea was not a competent, voluntary, intelligent and Knowing Admission of guilt with an understanding of the Law in Relation to the facts.

④ The Rule 11 colloquy was flawed in the following Areas:

[redacted]

The plea agreement erroneously stated I had 30 days after entry of the plea to withdraw it instead of 30 days after final disposition of the court pursuant to the dictates of State v Nesler 31 P3d 529 (UT 2001) or §77-13-6(2)(a) but plain error or exceptional circumstances can always be a basis even if absent a motion to withdraw. See Nesler App ct. 996 P2d 1068 and §77-13-6(2)(c) allows for guilty plea challenges under §78-35a, and 65c outside the periods prescribed under §77-13-6(2)(b). See State v Manzanares 964 Pad 313, 315 (ut. 1998).

(5) A. No one explained that Aggravated Robbery was bifurcated and that robbery had to be proven first before Aggravated enhancements could be added because had I known that it had to be proven that I took personal property from his person off his person or in his immediate presence accomplished by means of force or fear, I would never have pled guilty because this would necessarily require some sort of proof that I was there; ie. Fingerprints, footprints, positive ID, etc. It is axiomatic that even if they had a weapon, a weapon without proof of who held it cannot constitute commission of the offense. Had I known this I would have gone to trial irregardless of my "confession" [redacted]

B. The court failed to (and the attached docket entry/plea agreement tell the story) §8(e)(3) explain and ensure I understood each right I was waiving. This is especially important considering that it is proven that I did not commit one of the crimes that I was coerced into admitting to. Had I understood these rights, I would never have pled guilty.

C. §8(e)(4) The elements were never explained to me by anyone, and the plea agreement does not even properly recite the elements because the robbery statute uses the words "personal property" which implies that I have to be identified by the victim as being the perpetrator taking the property from his person or in his immediate presence. I was never identified and had I understood this, I would never have

[redacted]

pled guilty because it was explained by a detective and my counsel that because I was in the car of the suspects I was guilty, and I am not. No weapon was ever found on me nor was I identified by any of the victims at any time. I was only implicated by codefendents who had a motive to do so. Had I known that it had to be proven that I took personal property off someone's person or in his immediate presence, I would never have pled guilty. The plea agreement fails to recite this. Intent is also an element that has to be present.

D. Under §§(c)(4)(B) the factual basis does not establish that I committed the crime, with any probability... ie, no fingerprints, weapon, footprints, scientific evidence, positive identification, no identifiable camera footage., nothing. The evidence does, however, prove my codefendents had a motive to point the fingers at me because they know I am mentally ill. It is stated all throughout my codefendents' interviews that I was looking for my medications, and it was later found that Dawette Coleman had my pills in her purse the whole time. see ex 4. It is clear that the plea is a product of ineffective assistance of counsel, as discussed in Ground A. The confession is a product of mental illness and since this alleged crime spree also involved Davis County, it should be noted it was found that I admitted to a robbery in Davis county that was proven I did not commit. This brings validity to my incompetency claim and it undermines §§(c)(4)(A) as well as §§(c)(2). There was no factual basis for the plea. Had I understood this, I would never have pled guilty, but would have insisted on going to trial.

E. Under §§(c)(5) the court never explained that I must be imprisoned for 5 years before being eligible for parole and since incarceration is before the board, the court never explained that the matrix calculation in the PSI did not have full force of the law or just how the sentence could be. 5 years which may be for life unless sooner terminated by the board of Pardons and parole as specified in § 76-3-[redacted] or how it relinquishes

[redacted]

jurisdiction to the Board, and had I known this, I would never have pled guilty. Blakely v. Washington 542 U.S. ___ (2004) Forbids This.

F. §§ (c)(7) and §§ (c)(8) I was never advised of my 30 day right under St. v. Gibbons 31 P3d 528 (UT 2001) to withdraw my plea or that I had any appeal rights whether limited or not because I would have withdrew my plea or appealed. Therefore, I assert my privilege under §§ (e) to withdraw my plea because "the court" did not "find", under §§ (e), the requirements as delegated procedurally, or by any legally sufficient means. See also §77-13-6 et seq. (2003) the issues herein ~~[illegible]~~ these pleadings are cognizable on appeal see Petition + motions. Further, stating that I cannot withdraw my plea for any reason after 30 days is not correct stating of the law. See §77-13-6 et seq. which allows withdrawal under 65c. This mis-statement of the law misled me and prevented me from being able to pursue withdrawal when I realized the issues spoke of in Ground 1. See Plea Agreement at 5. Ex 5.

G. The court committed plain error in not strictly complying with the dictates of Rule 11. This affected the fundamental fairness of the proceedings affecting the substantive and Procedural Due Process of Art 1§7 and the 14th amendment protections, statutory and other procedural protections as well as violating the self-incrimination clauses of both constitutions, and that makes the plea agreement (contract) legally deficient, thus ~~[illegible]~~ void, constituting errors that affected my substantial rights especially since I was not competent to confess or to plead guilty.

The plea was involuntary, not intelligently entered, uninformed, and unknowingly entered and is constitutionally infirm.

H. Rule 11(i) I was never advised of the right to enter a conditional plea that I could withdraw if I prevailed on appeals.

The Diagnostic report indicates that at that time I did not meet the criteria for "serious" mental illness, but did not discuss my position at the time of arrest to when I pled guilty in Davis County, where I had attempted suicide twice. I was in Davis County Court first. The Diagnostic

[redacted] was ordered by Davis County. Weber relied on all of Davis County's tactics and investigations, and conducted no independent evaluations. Diagnostics was ordered AFTER I pled guilty, in Davis County, but before my plea on 9/18/03.

On 5/19/03 counsel was granted a continuance to review the Diagnostic eval and to determine if additional requests for evals would be made. The Diagnostic eval was released on 6/18/03. The issue was not whether I was competent then, but was whether I was competent to confess which counsel determined that because I confessed, I needed to plead guilty. The case was scheduled for 7-21-03 for disposition. The case was again continued.

On 8-18-03, the Judge certified me for trial and counsel manipulated me to plead guilty. There was more evidence to my overall incompetency than there was in St v Holland 921 P2d 430 (UT 1996) Lafferty v Cook 949 F2d 1546 (10th cir 1991) Sena v New Mexico 109 F3d 652 (10th cir 1997) and my case goes to the heart of Bouchillon v Collins 907 F2d 598 (5th cir 1990) but the court "determined" that I was competent without ever having a hearing or eval by experts trained in mental health.

This was plain error and I have a right to Due Process under Art 1 §7 and the 14th Amendment to have proper plea proceedings as well as proper competency determinations from DHS as dictated in §77-15 et seq NOT UDC, prison diagnostics, which is part of the prosecuting team, not an independent, and impartial party.

I did not understand what was going on in the courtroom because I suffer from ~~[illegible]~~ bipolar disorder, which is a more serious disorder than Holland had. see Holland III.

That is provable and cannot be disputed. See Ex 3

Now for the Motion To Withdraw guilty plea which was Allowed To be filed by The district Court on 5-16-06:

On 5-18-06 The Court issued a ruling and order which The APPellant never recieved. At the Time The ruling was issued APPEllant was at The Mental Health facility at DRAPER Called Olympis, not at Gunnison CUCF. APPellant was heavily Medicated.

The ruling and order Told him That if he filed a Motion To Withdraw his plea it would be Considered by The Court So he filed it, just like everything else, PROSE'

Pursuant to The Courts ruling and order a ¶16, The APPellant submitted a motion To Withdraw his guilty plea under §77-13-6(b)(c) with This being Made as its own proceeding and during The pendency of a 65c Petition.

U.R.C.P. Rule 11(f) states:

"Failure To Advise The defendant of the Time limits For filing Any Motion To withdraw APlea of Guilty, No Contest or guilty And Mentally ILL, is not a ground for setting The plea aside, but may be the ground for extending The Time To Make a Motion To withdraw undes §77-13-6."

As APPELLANT has explained, he had ineffective Counsel based on several relivant and Meritable issues.

One Case That hits home: Ivy v Caspri 173 F3d 1136 (8th Cir 1999) (Where counsel failed To give adequate explaination of The Elements of The offence And did not advise APPellant To possible Mental health defence, or Voluntary intoxication defence), is Virtually The Same as The instant Case.

In This Case, Counsel agitated his ineffectiveness by not Comprehensively explaining These Viable defenses; And by his failure To investigate possible strategies of defence such as Suppression of evidence: like My unlawful arrest and interrogation, which led To an illegal confession; illegal Search and Seizure issues covered under The 4th Amend. of The united states Constitution and Art I Section 14 of UTAHS Constitution; and his failure To recognize a document (Plea Agreement) which Misstated The ~~health issues~~

law on a key point, especially considering APPELLANTs mental health issues which were, OR should have been, obvious to defence Counsel.

Because of this, the above issues make the claim of APPELLANTs lack of knowledge of his ability to file for ~~[illegible]~~ withdrawal more viable, see Adams v State 2005 ut 62, especially considering that the written Plea Agreement misstated the law, saying:

"If I want to withdraw my guilty... plea(s), I must file a written Motion to withdraw..., before sentence is announced."

Under Strostler 2000 ut App 28, 996 P2d 1065 Aff'd 31 P3d 528 Cut 2001 which was governing case law at the time of my proceedings, I should have been afforded 30 days after THE time of sentencing to withdraw my plea. The Plea agreement read differently. See ex

THIS creates a problem: on one hand, the Court defended itself on Rule 11 violations on the ground that I read the written plea agreement. However, now it defends itself on this issue by saying I should listened better in court. This is a violation of due process and gives a clear example of Counsels ineffectiveness.

Another example, perhaps most important, is the fact that all evidentiary statements made by APPELLANT were the result of an illegal confession in Davis County, a confession never even submitted as evidence. Counsel failed to recognize the importance of these facts and never investigated nor considered the possible supression of this evidence. This further would have eliminated the factual basis for the plea because there was no other evidence but a confessio

Any physical evidence, and confession made by APPELLANT were the result of an illegal search and seizure where APPELLANTs seizure by police was unlawfully extended; and where a Davis County peace officer personally drove the vehicle to the Layton city police Department Sally Port to be re-searched. Only then, not the first three searches made by police, was physical evidence found by the same detective who, unsupervised, drove the vehicle. Counse failed to investigate this violation of protocal, nor did he advise APPELLANT of his right to assert his rights under the 4th Amendment against illegal search and seizure these

facts were not found out until later after I recieved my file from Counsel.

Further, APPellant submitted several documents that Counsel failed To obtain, Namingly The discharge from The US ARmy for having auditory and visual hallucinations; reports from Weber County Mental Health; documents from McKay-Dee Hospital, Where APPellant was admitted To The Psychiatric ward for ~~Alcohol~~ Methamphetamine psychosis; and reports from Davis County Jail, Where APPellant attempted suicide Twice; And if Counsel failed To investigate These issues, so he could effectively defend his client, what would make The Court think That Counsel Would inform his client about Time frames for withdrowling The plea when having To file The motion To withdraw would require more work For Counsel, something he was obviously Trying To AVoid?

§ 77-13-6(a)(b)(c) make it clear That;

§§(2)(b) "A request To withdraw a plea of not guilty or no contest, except for a plea in abeyence, shall be made by Motion before sentence is announced. Sentence may not be Announced unless The motion is denied..."

§§(C) " Any challenge to a guilty plea not made with in The Time Period Specified in §§(2)(c) shall be pursued under §78 Ch. 35A and Post Conviction remedies Act and rule 65C URCP (UCA 2004.)

It is obvious That under The above provisions and §77-32-301 (3)(4)(5)(6) or §77-32-304(1)(b) Counsel was ineffective, was not loyal To his client, and failed To investigate The law and facts. How can APPellant be expected To understand The law in relation To The facts if Counsel Cannot advise him properly due To a failure To investigate? It is clear That Counsel was ineffective.

APPellant falls under both exceptions under §77-13-6(2)(a)(2)(b) and (c). First, under §§(C) The challenge is initiated under, or is available because of APPellants 65c petition; and §§(2)(a) allows a plea To be withdrawn only upon leave of Court and a showing That it was not Knowing or Voluntarily made.

There is not a lot of State case law on Timeliness issues like This case presents. APPellant will Then borrow from federal cases: US v Abreu

83 F3d 17, 19 (1st Cir 1996) discusses a similar case to this one as being a Misscarriage of Justice where evidence shows both prosecutor and defence failed to appraise defendant of the elements of a Weapons Charge; and Manifests injustice, Justifying withdrawl of plea because there was an insufficient factual basis for the charges. see US v Gobart 139 F3d 436, 438-39 (5th Cir 1998). Osborn v Shillinger 861 F2d 612 (10th Cir 1988) (where Counsel did nothing to assist petitioner in an effort to withdraw plea). Further there is not a lot of state case law on 65c plea challenges especially where the court allows a motion to withdraw to be filed.

In Agan v Singletary 12 F3d 1012 (11th Cir 1994) (counsel whose client plead guilty, was ineffective in failing to make an independant examination of the facts and circumstances in order to offer an informed opinion as to the best.) Agan is a case that parellels this case.

Appellants counsel failed in many ways; First he errored in not making sure I knew the right I have to withdraw my plea in accordance with §77-13-6(2)(a) and under UR Cr. P. Rule 22(e); he advised me of nothing and even Talked me into pleading guilty because I "Confessed", when had he investigated my so called "Confession" he would have known that there were obvious and substantial problems with the interrogation Techniques used by the police and my mental state during those interogations, issues with Miranda, and police intimidation. This is especially important, since I am mentally ill, was discharged from the US Army for my Mental illness, And the fact that he knew this and did nothing to stand at my defence. This matter is proven by his obvious lack of effort and loyalty. see Bouchillon v Collins 907 Fed 589 (5th Cir 1990) Id 597, Binion v Commonwealth 891 S.W. 2d 383, 386 (Ky 1995).

Counsel did nothing to obtain the Confession that APPellant was Manipulated into giving, Even Though Counsel knew of my mental problems St v Rettenberger 1999 UT 80 ; and there were several evidence issues that were not Kosher like the Cop who found all the "evidence" after driving suspects vehicle, unsupervised, to police station. Keep in mind that there were at least two previous searches of said Vehicle that yeilded nothing - only after vehicle was driven to police station was the evidence found.

Just The Things listed herein, That are proven in The records, would bring strong belief To The fact That Counsel did not explain to me about being able To file a Motion To withdraw or The time limits This pre-Judicial Error of Counsel.

Further, if The court reviews Rettenburger along with St v Quintana 826 P2d 1068 (Ut App 1991) (remand because court failed To Abide by Rule 11), St v Mills 898 P2d 829 (UT APP 1995) (Same), St v Vasilacopulos 750 P2d 92 (Ut App) cert denied 765 P2d 1278 (UT 1988) (it is an abuse of discretion To deny a defendants motion To withdraw his plea if defendant did not have full knowledge and understanding of The Consequences of his Plea), The Court would see The vilidity of this claim. you Can Challenge a Plea Through Rule 65C. see §77-13-6(2)(c).

It is obvious APPELlant did not have full understanding of The Consequences of his plea and even if The APPEllant only had lack of knowledge of The Time To file fore withdrawl of The plea To stand on, The Consequences are Too great not To Allow The APPEllant The ability To have That important right back.

Therefore, The APPEllant respectfully requests That This Court reverse on This issue because of Counsel's failure To advise APPellant of his right To file a Motion To Withdraw under St v Ostler 2000 UT APP 28, 996, P2d 1065 Aff'd 31 P3d 528 (UT 2001) or grant This motion because The lack of Complience Prejudiced The APPellant. He wanted remedy because he knew That There were Things wrong with his Case but due To Counsel's failure To properly advise him on This issue of remedy And other Errors of Counsel; APPellant would have sought remedy had he known he had some type of remedy available. The extra 30 days would have gave him The time he needed.

That should be obvious To The Court. The APPEllant has been Trying To seek remedy since 2004 in This court and in Davis County's Case because it was discovered That my Counsel, in Weber County did not Conduct an independant investigation on This case, he borrowed Davis County's information from another attorney, One who also failed To investigate, and he did not Conduct his own discovery. He borrowed That from Davis County Also. Appellant is entitled To further review on These issues.

Now To Continue with The issues The Court said had Merit;

On or about May 18, 2006, The Court ordered APPEllant To respond To The issues it determined not To be frivolous.

The APPEllant did not receive a copy of This order until on or about 12-10-07 when he received The Courts order as an exhibit attached To The states response in a Federal proceeding Thats since been dismissed.

Further, APPEllants mother did not recieve a copy of the Courts order either, and as she explained To the Courts clerk, she has a power of Attorney and has previously requested a copy of all documents. The Courts Clerk put a note in The docket stating such.

The issues The Court determined To be meritous are:

1. The APPEllant was not told of The elements of Aggravated Robbery, including a Taking of personal Property from a person or in his immediate presence
2. I was not informed of how the law related To The facts.
3. I was not advised of every element of The Crime
4. I was not advised That The state had The burden of proving Every Element of The offence.
5. I was not informed of my right To appeal.
6. Counsel should not have Considered my Confession in decided To recommend That I Plea Guilty.
7. The Plea was unknowingly entered because I was incompetent at The Time That I entered The Plea.
8. I was so incompetent I was not able To enter any type of Plea
9. The Court incorrectly determined Competency
10. The Court did not Correctly follow The procedure To Establish Whether The APPEllant was Competent when it did hold a hearing or obtain Evaluations from Mental Health-Experts.
11. The Court did not explain That APPEllant would have To be in prison for at least 5 years before he would be eligible for parole or That he could be imprisoned for life.
12. The Court did not strictly Comply with Rule 11(E)
13. There was an insufficiant factual basis for The Plea.
14. The APPEllant did not recieve a copy of The P.S.I
15. The APPEllANT recieved insufficient Counsel.

The APPEllant will outline These issues The best he

can. The Court should note That I do not have a lawyer, The Prison Contract Attourneys refuse TO help me, and I am indigent and cannot afford case law.

On Ground 1 of The Courts ruling of meriterious issues The APPELlant was not Told of The elements of Aggravated Robbery, APPELlants counsel never explained what The elements were. Now The Court should note That when all This was going on APPELlant was going Through serious psychological changes and Attempted Suicide TWice.

APPELlANT could not have been charged with Aggravated Robbery because; A. He never entered a store in which he could be in The presence of a victim to unlawfully and intentionally Take;

1. Personal Property in The Possession of another,
2. By means of Force or fear,
3. By using force or fear against another during the Commission of A Theft;

B. APPELlAnt was never identified at any crime allegedly Committed in Weber County nor was There any identifiable Surviellence footage or fingerprints. The only reason I was charged was because Weber County needed TO Clear Their books,

IF I Would have understood That a defendant had to be in a victims immediate presence and That you had to take personal property from another in his immediate presence ~~and That you had to Tak~~ accomplished by means of force or fear, That To get The aggravated charge I had not only be guilty of The above, but That I had to use, or Threaten To use, A dangerous weapon or TO Cause serious bodily injury; Well, had I known This, do you really Think I would have Pled To a 5 To life Sentence when I would have lost nothing in going TO Trial by Jury?

Had Theese issues been Thoroughly explained TO me - Had They even been hinted at - So I could make an informed or intelligent Choice, I would have insisted on going To a Jury Trial because I had provable alibis which Counsel did not investigate.

My attorney, The so-called defender of my rights, stated That I had To plead guilty, That I had no other choice because They "had me". Instead of investigating, instead of making any effort at all

To build a defence as far as the full facts would allow, he played on my mental health problems because he fully understood my incapabilities to recognize his lack of loyalty. Its obvious he did not investigate a defence as far as the law would allow. See St v Holland 876 P2d 357 (UT 1994) and St v Classon 935 P2d 524 (UT App 1997)

"I was not informed of the law and facts." This is the same arguement as in ¶1 above but it also involves the fact that I was suffering from Methamphetamine psychosis and I was extremely drunk when it is alleged that I committed these crimes. This is where the alibis become important because not only do they prove that I did not commit the crimes, that I was not even in the vicinity of the scene of the crimes; but they also give testimony of how intoxicated I actually was.

Because these are crimes that involve a specific intent, Adams supra applies, and Adams also shows how Counsel is ineffective for not raising intent/element issues See Adams , see also Ex 4 St v Wood 648 P2d 71 (UT 1982) ¶ 91 ("explaining that a attourney acts as an assistant for his client, not a master").

This is where investigation would be needed to undercut the Prosecutions Case, And to prove the "If all else fails" defence, the lack of intent defence; even if it means only getting the case down to the intent of a lesser charge, because anything is better than a 5 to life. However, the problem here is that I am not guilty of any crime other than may be some intoxicant crime.

"I was not advised of any element of the crime", I was not advised of any intent or element of the crime before signing the plea agreement. My attorney, whom I thought was my defender, told me to just sign it, that it would all be explained by the Judge anyway. I was not advised that one element required that I actually be in the victims presence, and that I had to take property from their person or in their immediate presence by means of force or fear.

Had I known these elements, and how crucial they were to the states case, I would never have pled guilty because I had alibis placing me somewhere else - Provable alibis. I would have insisted on a Jury Trial. See St v Breckenridge

688 P2d 440 (UT 1984). "I was not advised that the state had the burden of proving every element of the offence." I had no idea or understanding of burden and it wasn't until I came to Prison that I understood that this was a legal Requirement. My Attorney told me to sign the plea agreement and said the Court would explain, but the court did not explain some of the issues covered in the written agreement. These are some important issues that I had a need to know, but counsel did not advise me. Had I been properly advised of burden, I would have insisted on a Jury Trial. I never had an understanding of the specific rights I was waving. I am Mentally ill, so it should be apparent how important it is to advise me of these things. How can I be expected to understand these issues when I am psychologically and emotionally unstable? If its important to advise a non-mentally ill person of the Rights he is waving when entering a guilty plea, is it not more important with someone who is mentally ill? See St v Holland 921 P2d 430 (1996).

Had I known that the court had to conclusively prove that I Entered the store and stood before the victim and take personal property accomplished by Means of force or fear, I would have demanded a Trial, because the cannot prove this element of the offence. It is an impossibility.

Issues This issue is simple. My attourney and the court, under U.R.Cr.P. Rule 22(c), failed to advise me of my right to appeal. Granted, only a few of these issues could be raised on direct Appeal If the Court Finds this to be the case, there has to be a determination Made of which issues cannot be filed on direct appeal and which can, so this won't extinguish appeal rights on issues that have to be raised in which situation. The Higher Court determines this Not the Plea Affidavit.

"Counsel should not have considered my Confession in deciding to recommend that I Plea guilty." This issue is supportive of the rule violation and other issues raised above because it proves that my lawyer believed he didn't need to investigate the case

He believed that my confession eliminated his need to put the case at an adversarial stance. There was no "strategic move" in not moving to suppress a confession taken illegally from a mentally ill client. Ivy v Caspari 173 F3d 1136 (8th cir 1999); Baria v Keane 99 F3d 492 (2nd cir 1996); Agan v Singletary 12 F3d 1012 (11th cir 1994) (this is a case where, like this case, counsel did not conduct any independent examinations of the law and facts because counsel told me he was only willing Albrights investigation out of Davis County)

There is no sound strategy in not investigating a clients case where alibi's and other evidence exist that may prove your clients innocence. See Osborn v Shillinger 861 F2d 612 (10th cir 1988); State v Holland 876 P2d 357 (Ut 1994); US v Cronic 466 US 648 (1984).

What has happened in this case should neither accepted nor acceptable.

Holland makes it clear that;

> "Defence counsels obligation is to explain the evidence against the defendant, the nature of all defences that might be provable, all the various options the defendant has in pleading guilty or not guilty and going to trial and the likely or possible consequenses of these options... Certainly Attorneys are bound to have private feelings about the clients they represent and their guilt or innocence, but it is their professional responsibility to set aside private feelings and judgements and vigorasly argue the law and the facts in a light as favorable to the defendant as the law and facts permit." Id at 363

Where my attourney did no investigation of his own, he has no right to form an opinon of my case, he has no right to say there is nothing to investigate, no right to say "You confessed. Do you really expect anyone to believe you didn't do these crimes?" He cannot professionally state there wasn't any need to investigate, nor can he competently advise me to plead guilty on a case he did not investigate. He cannot properly advise me to plead guilty

To a Crime that is arguably triable unless his loyalties were not with Me. That is not called "strategy," it's called "disloyalty."

Counsel did not investigate the unlawful confession. If he would have he would have found it unlawful and would have moved for Supression. He would have seen that I was not read my rights, That I was high on drugs and sloppy drunk during my interrogation, That I was going Through Psychosis from drugs and That my unstable psychiatic condition was Manipulated by The police and lied To. The police exploited me based on my Mental illness and intoxication. My attorney also recognized my obvious mental Health issues and he also exploited The situation because he knew I was an easy person To get out of his hair or To use as a bargaining chip with The Prosicution, ie "I'll give you This one if you give me That one!" See Adams ¶¶ 19-27.

Put simply, My Attourney believed I was guilty and refused To defend me because I entered a "Confession", one he obviously believed in, Therefore Joining The State in an effort To obtain a Conviction. Its all Too obvious - See Osborn 629; Holland at 360

"Appellants guilty Plea was unknowing because he was incompetent at The time That he entered The plea." Appellant acknowledges That past mental illness does not settle The issue of whether The defendant is presently competent To Stand Trial. US v Leggett 162 F3d 237, 244 (3rd Cir 1998), but know The court Sould realize That The defendant is recieving help from inmates To Fight his case but where The court has no new information, a competency evaluation should be done, Especially where This defendant was discharged from The U.S. ARMY due To Mental illness, has Congenital mental illness (passed from Generation To Generation) in his family, and The court failed To Conduct a competency hearing when The defendant exhibited bazaar behavior, including self-Mutilation and Two suicide attempts - something That Competent people do not do; Str Holland Supra at 5.

Appellant should have been granted a hearing on his

Competency issue and the other issues herein because trying to deal with a complex issue like this without access to current legal materials is difficult

At the time of the plea, I was not on any psyche-meds and I was depressed, self-destructive and suicidal. Because of this, I did not understand what was going on and didn't know how to ask for help. I felt like everyone, including my own attorney, was out to ensure a conviction. My attorney explained nothing to me, I didn't understand the proceedings against me.

"I was so incompetent that I was not able to enter any type of plea". Most of this has been addressed herein. I had no idea ~~no idea~~ if I was guilty or not and I was not sure what I could be guilty of. I was disassociated, so I just did what my lawyer told me to do. When questions of mental competency were raised, the Court did not follow by UCA §§ 77-15-5 as explained in the complaint and would be better explained by a lawyer.

I realize that the court is under no obligation to order a hearing, but the court is obligated to follow case law, And the law says I should have had a hearing. See Holland supra Holland states that "When there is a substantial question as to a defendants competency, at the time of a guilty plea the Trial Court must order a hearing to determine the defendants present capacity to make a plea of guilty.

This presupposes a proper proceeding. What counsel did was use Davis County's investigation instead of doing independant investigation in Weber County. The Mental Health evaluation done at the prison did not meet the requierments of §§ 77-15-5, and does not meet the requirments of two Mental Health experts not involved in current treatment. See Lafferty v Cook 2001 UT 19 Cert den 534 US 1018 (2001). That is why what happened here is wrong and it cost my rights to be compromized. APPELLANT does not have access to what he needs to adequately argue his case

"The court did not explain that the minimum I would serve was 5 years maximum of life, or that the Matrix of 9 years did not have full force of law." I did not know and

Was never told That a 1st degree felony means a minimum of 5 years before consideration for parole or That I could spend my life in prison. My Attorney told me that 9 years, The matrix, Was The most I would serve.

IF The matrix is not binding it should not be represented as being binding because it is a misrepresentation. I would never have freely handed The rest of my life over to a Board That has No limits in their power. Why is a matrix even used if it doesen Mean anything once Im sentenced? This state has Too many ways of manipulating defendants, and This was my deciding factor. I believed I would serve a maximum of 9 years. APPellant deserves another day in Court,

"Failure to strictly comply with Rule 11(e)". This has pretty much been discussed herein. The Court did not comply with Rule 11(e), as discussed in The petition and subsequent pleadings. The Court erred, but The lawyers for defence and prosecution are just as guilty by misleading The proceedings by Their agreeing with each other or by not objecting To The Court.

"APPellant asserts That There is an insufficient factual basis for The plea". And This is discussed supra, but a guilty plea cannot be considered To have a factual basis when given by an incompetent defendant, under Rule 11(e)(4)(b) or when defence counsel is ineffective because a case had no adversarial Testing. Proof That counsel was disloyal lies in his refusal to investigate independently by borrowing Davis Countys diagnostic evaluation from The prison. How much more do you need? Counsel did not do his Job - his duty. It isn't right, and anyone Who can say it is, doesnt deserve To hold The Title of "Honorable" anything.

"APPellant recieved ineffective counsel". APPellant agrees with The Court That I allege facts sufficient to Establish Ineffat. Counsel but The Court states That I don't state Prejudice. I submit That This is not necessary when it has been established That There was no adversarial Testing on The Prosecutions case. All Concern for My rights was swept under The rug.

you could have put a rotten aluminum beer can on the Podium and got the same representation - If not better - than what I recieved. See Cranis, Holland supra.

Another form of Prejudice is that I recieved a 5 to life Term, where on the facts of this case, with a half-decent attorney, would merrit a theft case, a 0-5 year term.

With everything asserted herein, which is provable in the record, I would have never recieved a life sentence. Since coming to Prison, your Honor, Ive been raped numerous time beaten, belittled and have been subjected to discrimination based on my Effeminate Traits. I havent been able to visit my family since 2004 and my girlfriend left me. I have been punished More Than ~~ever~~ enough for any crimes I may have Committed. The Court said Cooperate. my Attorney said Cooperate, That If I did Things would go easier for me. Well, Ive cooperated, and all Thats happened is ive gotten railroaded, beaten, abandoned and abused. I have to believe There is some Justice in your "Justus" system. Its all I ask, I Just want what is right.

Argument 2 " Did The Court err in failing to hold an evidentiary hearing when one was needed to develope the supporting facts on the issues the court said had merit?"

Appellant submitted documentary evidence sufficient to meet the preponderance of evidence of the Utah post Conviction Remedies Act that was in force when the petition was filed See §78-35a-105; (UCA 2004);

" The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to Relief. . . . . " (In pertinent part)

Appellant is unable to find any state Law governing this matter so he must borrow from Federal Law under Rule 8 of the Rules Governing §2254 cases in the United States District Courts believing that state Reasoning would be, at least, close to Federal Reasoning and ~~Rules~~ Rules.

Townsend v Sain 372 U.S. 293, 319 (1963) makes it clear that the appropriate standard to use to determine if an evidentiary hearing is warranted is;

" where the facts are in dispute, the Federal Court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair Evidentiary hearing in state court either at the time of trial or in a collateral proceeding."

Now Appellant realizes this is a federal standard but he assumes that in state court, if the facts are in dispute as they are here, the state court must hold an evidentiary hearing.

The habeas court here, erred in not holding the hearing and the Appellant Requested one because facts are in dispute and Appellant can prove his points.

A case very similar to the instant matter is Tower v Phillips 979 F2d 807, 811 (11th Cir 1992).

In Towers the 11th circuit could not determine conclusively the merit of Towers claims from an examination of the petition supplemented by the undisputed facts of the record, the 11th circuit had to Remand the Case for an evidentiary hearing under 28 USC § 2243.

Towers claims of Ineffective Counsel and Guilty plea issues are similiar to this case especially with the penality issues/matrix issue and counsels faulty investigation and mis Representation issues.

It is obvious that Appellant surpassed the "Faivilous on its Face" of Rule 65C (g)(1) and (g)(2) et.seq., And this more so compelling because the Court granted a motion to vacate its earlier dismissal and reinstated the parts the court determined had merit.

What made that determination is that instead of fitting the criteria of §§(g)(2) the cases issues not dismissed did state "facts that support a claim for relief as a matter of Law" and the "claims have an arguable basis in fact".

This cannot change Just because the State was given a chance to Respond. All that would do is make the facts more in dispute making an evidentiary hearing more warranted.

Because of the foregoing the Court erred in not hold an evidentiary hearing.

The appellant cited pertinent and Relevant Case Law that squarely supported his claims. The factual scenario of the "cases" the State cited do not and cannot fit within the factual scenario of this case and because of the issues Raised in this case, it must do so.

This case is very fact sensitive and requires scrutiny when reviewing the issues because as the Supreme Court admitted in Holland that just because a defendant mechanically answers questions in

the plea colloquy doesn't mean he understands them.

Appellants illnesses are more serious than Hollands and most of the delicate colloquy questions were answered by Appellants Attorney, not the Appellant. See Ex 6 change of plea transcripts.

Because of the issues involved in the Ineffective counsel claim an evidentiary hearing was warranted and even though Mr. Caine has passed on which Appellant was saddened to hear because he has done lots of good for Lots of people, the transcripts, oral Recordings, the prosecutor and any other Relevant testimony or documentary evidence including testimony and proof of Appellants alibis would conclusively prove Appellant is entitled by Law to relief.

It would seem that the Court would be more concerned about protecting Appellants rights and holding a hearing, because of the disputed facts and issues, than it would be offering the state its wish on a silver platter, which happens to [redacted] often in this state.

The District Courts often ignore pro se' post conviction litigants claims because the Courts know that an inmate is no match for the States deep pockets, either because of lack of knowledge or lack of resources to mount a defense against the states pleadings as well as lack of ability to effectively Appeal.

Utah courts fail to adopt a common practice of liberally construing pro se' complaints where when it can see that a claim has or could be made, that the court allow the Litigant to proceed irregardless of inability to make good Argument on papers or confusion of Legal theories. Haines v Kerner 404 U.S. 519 (1972) (per curiam) Utah Courts should Reconsider its practices.

Conclusion

Because of the foregoing the Court erred in its statutory interpretation and its conclusions of Law in that the issues were arguable and had a basis in Law and Fact.

The Court erred in not holding an evidentiary hearing and erred in dismissing the Petition as the errors and issues presented had a substantial and injurious effect on the outcome of the conviction and the Judge, if he was acting in proper Judicial capacity, should have had grave doubt as to the validity of the conviction.

This Court must Reverse the denial of the Petition and order the Court to hold an Evidentiary hearing because without one, proper consideration of the issues is impossible.

Dated this 8th day of JUNE 2009.

/s/ Shawn L. Whitmore

Certificate of Service

I certify that I have mailed a copy of the foregoing to the party listed below, postage prepaid, on this 8 day of JUNE 2009.

/s/ Aaron J. Hellstrom

Brett Delporto
Asst. Attorney General
160 E. 300 S. 6th FL.
PO Box 140854
Salt Lake City Utah
84114-0854

Ex 1

Ruling + order on 5/18/06

Docket Entry 3/24/09

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

AARON HELBACH, Petitioner, vs. STATE OF UTAH, Respondent.	**RULING AND ORDER** Case No. 031901411 FS Honorable Roger S. Dutson

When the Petitioner filed a petition challenging the validity of his guilty plea, this Court summarily dismissed it after a review of the record showed that the Petitioner's claims were without merit. Subsequently, the Petitioner asked for reconsideration arguing that the law does not allow a review of the record or the merits of a petitioner's claims at this stage of the proceedings. Because the Court finds that the Petitioner's arguments are valid, the previous order dismissing the petition is vacated.

Upon receiving a petition for post conviction relief, a court must summarily dismiss claims when, based solely on the pleading's allegations, it appears that the facts alleged do not support a claim for relief as a matter of law, or that the claim has no arguable basis in fact. Utah R. Civ. P. 65C(g). The court will review only the information contained in this petition.

1. Elements of Aggravated Robbery

The Petitioner alleges that he was not told that the elements of aggravated robbery included: (1) a taking, (2) of personal property, (3) from a person or in his immediate presence,

and (4) a positive identification by the victim. A defendant must be informed of the elements of the charge before a court may accept a guilty plea. State v. Merrill, 114 P.3d 585, 592 (Utah 2005). The aggravated robbery statute in effect at the time the Petitioner committed the crime states that, "[a] person commits aggravated robbery if in the course of committing robbery, he . . . uses or threatens to use a dangerous weapon as defined in Section 76-1-601. . . ." Utah Code Ann. § 76-6-301 (2003). The robbery statute states that, "[a] person commits robbery if . . . the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear. . . ." Utah Code Ann. § 76-6-302 (2003). Clearly, the statute includes the elements of (1) a taking, (2) of personal property, (3) from a person or in his immediate presence, so the Petitioner's claim that his plea was not voluntary because he was not advised of these elements, is not facially frivolous. That issue will be forwarded to the Utah State Attorney General's Office for review. However, a positive identification by a victim, is not an element of aggravated robbery, so this claim is summarily dismissed as facially frivolous.

II. How the Facts Constitute The Crime

The Petitioner alleges that he was not told how the facts of his case constitute the crime charged. "Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." State v. Breckenridge, 688 P.2d 440, 444 (Utah 1984). The Petitioner has at least stated a possible cause of action, so that issue will be forwarded to the Attorney General's Office for review.

III. Bifurcated Procedure

The Petitioner asserts that his plea was not knowing, because no one explained that proving aggravated robbery was a bifurcated procedure requiring proof of robbery before aggravated robbery. He states that had he known that the Prosecutor had to prove that he took personal property from a person by means of force or fear, he would not have entered into a guilty plea, because these elements require some proof that he was at the scene. It is not clear which of the following three probable claims the Petitioner is making.

If the Petitioner means to state a claim that his plea was unknowing, because he did not know that a conviction for an aggravated crime is done in a bifurcated procedure, he has stated a facially frivolous claim. The Petitioner has not provided, and the Court has not found, any support for this proposition, and the Court concludes that this information is not required. The Court finds support for its conclusion in State v. Corwell, 114 P.3d 569 (Utah 2005). In Corwell, the defendant argued that the court's duty under Rule 11(e) of the Utah Rules of Civil Procedure (Rule 11(e)) to advise her that her right to appeal was limited. meant that the court must explain numerous appeal issues. The Supreme Court of Utah observed that nothing in the plain language of Rule 11(e) required such a detailed explanation. The Supreme Court also referenced, State v. Visser, 22 P.3d 1242 (Utah 2000), where it held that a trial court was not required to explain every aspect of the right to a speedy trial. Consequently, the Supreme Court held that a defendant was not entitled to an explanation of every aspect of the right to appeal. The Court concludes that requiring a trial court to explain the bifurcated procedure used in a conviction for an aggravated offense is tantamount to requiring a court to provide a detailed explanation of appellate issues. Therefore, the Court summarily dismisses this claim.

The second possible claim the Petitioner could be making is that he was not advised of

every element of the crime. This claim echos the Petitioner's first claim, but it alleges that none of the elements were explained. This claim will be forwarded to the Utah State Attorney General's Office.

The third possible claim the Petitioner could be making is that his plea was unknowing, because he was not advised that the State must prove every element of the crime. As stated before, a defendant must be advised of the consequences of his guilty plea. See, State v. Merrill, 114 P.3d 585, 592 (Utah 2005). Therefore, this claim will be forwarded to the Office of the Utah State Attorney General for review.

IV. Ability to Withdraw Guilty Plea and the Right to Appeal

The Petitioner has included two different paragraphs which contain contradictory statements regarding whether the Court made mistakes when advising him about his right to appeal and his right to withdraw his guilty plea. In his second paragraph he states that he was *never advised* of his right to withdraw his guilty plea or his right to appeal. However, in his first paragraph, he states that the plea agreement *incorrectly* advised him that he had thirty days from the entry of a plea to withdraw his plea. Further, the Petitioner argues that the law allows the withdrawal of a guilty plea upon a showing of good cause or exceptional circumstances, or by using a petition for post conviction relief Finally, the Petitioner states that he would like to assert his right to withdraw his guilty plea pursuant to Rule 11(f).

The failure to inform a defendant of the right to appeal can constitute a denial of the right to appeal. See, Manning v. State, 122 P.3d 628, 636 (Utah 2005). Therefore, the Petitioner has stated a claim for relief, and the Court will forward this claim to the Attorney General's Office for review.

Before addressing the Petitioner's claims related to his ability to withdraw a guilty plea, the Court notes that withdrawal of a guilty plea is not a right. State v. Dean, 95 P.3d 276, 280 (Utah 2004). To the extent that the Petitioner means to assert a claim that his right to withdraw his guilty plea was violated, he has stated a facially frivolous claim which is summarily dismissed. The Court will address the Petitioner's arguments assuming that he means to assert a claim that he was not advised of his ability to seek withdrawal of his guilty plea.

If the Petitioner is claiming that he never was informed of his ability to withdraw his guilty plea, he has stated facially frivolous claim. To state a claim in a petition for post conviction relief, the basis for that relief must be one, such as a constitutional violation, listed in the Post-Conviction Remedies Act (PCRA). Pleading a violation of one of the prophylactic provisions of Rule 11(e) is insufficient. Salazar v. Utah State Prison, 852 P.2d 988 (Utah 1993). The only possible constitutional violation implicated by this issue is whether the failure to advise the defendant of the ability to withdraw a guilty plea renders the plea unknowing or involuntary. The Petitioner has not provided, and the Court's review of many cases, has not revealed any support for such an assertion. Two case which addresses this issue suggest to the contrary. In State v. Dean, 95 P.3d 276, 280 (Utah 2004), the Supreme Court of Utah stated that withdrawal of a guilty plea is not a right, it is a privilege which may be granted upon a showing of good cause. In State v. Merrill, 114 P.3d 585 (Utah 2005), the Supreme Court of Utah stated that the right to *seek* withdrawal of a guilty plea is not subject to constitutional protections. Because withdrawal of a guilty plea is not a right, it is unlikely that the failure to advise a defendant that he can seek withdrawal of his guilty plea renders the plea unknowing. Further, Rule 11(f) states the failure to advise a defendant of the time limits in which he may make a motion to withdraw a

guilty plea, is not a basis to set the plea aside. Given the lack of support for the Petitioner's position, and the strongly suggestive language in the cases and Rule 11(f), the Court concludes that a defendant does not have the constitutional right to be advised of his ability to pursue the withdrawal of his guilty plea. Therefore, this claim is summarily dismissed.

If the Petitioner is claiming that his guilty plea should be vacated, because he was incorrectly told of the time limits for withdrawing his guilty plea under State v Ostler, 31 P.3d 528 (Utah 2001), his claim is facially frivolous. Ostler interpreted a statute which allowed a defendant to withdraw his guilty plea up to thirty days after its entry. Since Ostler, this time limit has been changed. This amendment was in effect when the Petitioner committed the crimes and entered his plea. Therefore, the Court summarily dismisses this claim.

Petitioner also claims that any statement which gives a time limit for withdrawing a guilty plea is an incorrect statement of the law. The Petitioner cites to State v Marvin, 964 P.2d 313, 318 (Utah 1998) to demonstrate that a defendant may withdraw a guilty plea upon a showing of good cause or exceptional circumstances. He also notes that withdrawal can be done by using a petition for post conviction relief. If this is a separate claim for relief, it repeats the Petitioner's claim that he was incorrectly advised of the time limits to withdraw his guilty plea. Therefore, it is summarily dismissed as facially frivolous.

The final issue in this claim, is whether the Petitioner may assert his "right" under Rule 11(f) to make a motion to set aside his guilty plea, because he was incorrectly informed about the time limits for making such a motion. However, the Petitioner has not submitted a motion to withdraw his guilty plea. Therefore, the Court dismisses this claim as frivolous.

V. Conditional Guilty Pleas and Incompetency

The Petitioner's next claim is also unclear. He firsts states that his plea was unknowing, because he was not advised of his right to enter into a conditional guilty plea. Then, he makes multiple allegations regarding his competency. First, he was evaluated for mental incompetency after a conviction in Davis County but before his guilty plea in Weber. Second, the evaluation stated that he did not suffer from any serious mental disorder at that time. Third, he was not competent to make a confession. Fourth, when his lawyer saw the report, he incorrectly advised him to plead guilty, because the Petitioner had confessed. The Petitioner claims this advise was unsound, because his attorney should have been looking at his competency at the time he confessed. Fifth, the Petitioner alleges that the Court made several procedural errors in assessing his competency, because (1) the Court did not order another evaluation by the Department of Human Services which the Petitioner claims is required by 77-15 et. seq.; and (2) the Court incorrectly stated that he was competent without ever holding a hearing or getting an evaluation by mental experts; and (3) the Court was incorrect in its assessment of competency, because his mental disorder was worse than in several other cases which the Petitioner cites; and finally, the petitioner alleges that he did not know what was going on in the courtroom, because he suffers from bipolar disorder.

The Petitioner could be making several possible claims: (1) the Petitioner was entitled to be advised of the right to enter a conditional guilty plea (he would have used that right to exclude his confession and contest his competency to stand trial); (2) his plea was unknowing, because he was not advised of his right to enter a conditional guilty plea; (3) he was incompetent at the time he confessed, so using his confession to obtain a guilty plea is illegal (this claim was made in this petition); (4) the Petitioner was incompetent at the time he entered a guilty plea, so his guilty plea

was unknowing; or (5) the Petitioner was too incompetent to enter any type of plea (this claim was made in this petition). Again, the Court will address each possibility in turn.

The first two of these possible claims are based on the incorrect assumption that a defendant has the right to be informed of the ability to enter a conditional guilty plea and/or he had the right to enter a conditional guilty plea. Based on the following analysis, the Court dismisses the first two possible claims as facially frivolous.

The Petitioner has not provided, and the Court cannot find, any support for the proposition that a defendant has the right to be informed of the ability to enter a conditional guilty plea, and the Court concludes that it is not required to inform a defendant of this option. The purpose of Rule 11(e), which lists the rights of which a defendant must be informed, is to ensure that a defendant's plea is voluntary and *knowing*. See, State v Gamblin, 1 P.3d 1108, 1111 (Utah 2000) (emphasis added). The ability of a defendant to enter a conditional guilty plea is not one of these rights listed in rule 11(e)–it is listed in Rule 11(i). Therefore, the Court concludes that it is not required to advise a defendant of the possibility of entering a conditional plea, before a defendant's plea can be characterized as voluntary.

Also, the Court concludes that the Petitioner does not have the right to enter such a plea. Rule 11(i), which lists the conditions under which a court may accept a conditional guilty plea, states that a defendant can only enter a conditional guilty plea if the prosecutor consents, and the court approves. The plain language of Rule 11(i) demonstrates that the ability to enter a conditional guilty plea is a privilege--not a right. This conclusion is supported by State v Gamblin, 1 P.3d 1108 (Utah 2000). In Gamblin, the Supreme Court of Utah concluded that withdrawal of a guilty plea was a privilege not a right, because the plain language of the statute

stated that withdrawal was conditioned on court approval. The rule allowing the entry of a conditional guilty plea, also conditions this ability on court approval. Therefore, the Court concludes that the ability to enter a conditional guilty plea is not a right.

The Petitioner's next possible claim is that he was incompetent when he gave his confession, so it should have been excluded. The Petitioner apparently presumes that exclusion of the confession would mean that it could not be used by his attorney to encourage him to plead guilty or by the prosecution as a basis for the guilty plea. "[B]y pleading guilty, the defendant . . .waives all nonjurisdictional defects, including alleged pre-plea constitutional violations." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989). Whether a confession can be used due to a defendant's incompetency is a pre-plea constitutional issue. Therefore, this claim is frivolous and summarily dismissed.

The Petitioner's claim, that his attorney should not have considered his confession when recommending the plea bargain, is one for ineffective assistance of counsel. To succeed in an ineffective assistance of counsel claim, a petitioner must at least allege that counsel's performance fell below professionally competent assistance, and but for counsel's deficient performance, there is a reasonable probability that the proceeding's results would have been different. Strickland v. Washington, 466 U.S. 668, 690-694 (1984). While the Petitioner failed to allege prejudice, the Petitioner's claim is sufficient for the review of the Attorney General.

Finally, the Petitioner claims that the prosecutor established a basis for his guilty plea by inappropriately using evidence obtained by engaging in unconstitutional behavior. The Petitioner did not provide, and the Court's review of many cases did not reveal, any support for his assertion. Therefore, the Court summarily dismisses this claim as frivolous.

The last of the Petitioner's possible claims allege that he was incompetent at the time he was entered his guilty plea. "It is well established that due process requires that a defendant be mentally competent to plead guilty and to stand trial." State v. Arguelles, 63 P.3d 731, 745 (Utah 2003). Because the Petitioner made allegations which facially support these last claims for relief, the Court will forward both of them to the Attorney General's Office for response.

As part of these claims the Court will forward the Petitioner's claims that the Court did not correctly follow the procedure to establish whether the Petitioner was competent–including the Petitioner's claims that the Court decided competency without a hearing or getting an evaluation completed by mental experts. However, the Court will not address the Petitioner's claim that he had the right to have his competency evaluated by the Department of Human Services (DHS) as stated in 77-15, et. seq., because (1) the Petitioner had undergone a recent DHS evaluation which was provided to this Court and (2) the Petitioner did not have this right. The only reference to DHS performing a competency evaluation in the statutes cited by the Petitioner is in 77-15-5(2)(a) which states; "[a]fter the granting of a petition and prior to a full competency hearing, the court ***may*** order the Department of Human Services to examine the person and to report to the court concerning the defendant's mental condition. Utah Code Ann. 77-15-5(2)(a) (emphasis added). Because an evaluation by DHS is discretionary, the Court is not required to provide an additional evaluation. The Court dismisses this part of the Petitioner's claim as facially frivolous.

VI. Explanation of Possible Punishments for the Charged Crime

The Petitioner also claims that his plea was unknowing, because he did not receive an adequate explanation of the punishment which would be imposed. The Petitioner states that: (1)

the Court did not explain that he would have to be in prison for at least five years before he would be eligible for parole; (2) the Court did not explain that he could be imprisoned for life; (3) the Court did not explain that the matrix calculation in the pre-sentencing investigation report (PSI) was not binding; and (4) the Court did not explain that it relinquished jurisdiction to the Board of Pardons and Parole after sentencing. Due process requires that a court explain the consequences of a guilty plea. See, State v. Merrill, 114 P.3d 585, 592 (Utah 2005). A Court must explain the minium and maximum punishment for a crime when taking a guilty plea, so the Court will forward the first two claims to the Utah State Attorney General's office for response. However, the Court has no obligation to discuss the PSI matrix as that is only advisory to the Court, and the Court need not explain that it relinquishes jurisdiction to the Board of Pardons and Parole as that is done by statute. These later two claims are dismissed as facially frivolous.

VII. Rights Which Are Waived Upon Pleading Guilty

Next, the Petitioner states that the Court failed to ensure that he understood all of the rights he was waiving. However, the Petitioner does not state of which right the Court did not advise him. Because, this mere allegation is not enough to state a claim, the Court summarily dismisses this claim as frivolous on its face.

VIII. Strict Compliance With Rule 11(e)

Next, the Petitioner states that the Court failed to strictly comply with Rule 11(e) when taking his guilty plea. The Petitioner does not state whether this allegation is a claim or is a factual allegation to support his claim that his plea was not voluntary and knowing. The failure to strictly comply with Rule 11(e) is not a basis to vacate a plea pursuant to a petition for post-conviction relief. See, Salazar v. Warden, 852 P.2d 988, 992 (Utah 1993)(a petitioner must

SECOND DISTRICT COURT - OGDEN
STATE OF UTAH

AARON L HELBACH Petitioner	CLERK'S CERTIFICATE
vs.	Case No: 060900429 RN
STATE OF UTAH Defendant	Appellate No:

STATE OF UTAH)
: ss.
COUNTY OF WEBER)

I, ROXANNE BAPTIST, Deputy Clerk of the District Court of the SECOND DISTRICT COURT - OGDEN, State of Utah, do hereby certify that the foregoing and hereunto attached papers and file constitute all of the original papers filed in the above-entitled Court and cause, including the Notice of Appeal and Minute Entries, and which attached papers constitute the Judgment Roll and other papers filed in the above action.

I further certify that the Judgment Roll and papers contained in said file or by me this day transmitted to the Appellate Court, of the State of Utah, pursuant to said Appeal.

WITNESS MY HAND AND SEAL of said District Court at my office in SECOND DISTRICT COURT - OGDEN, STATE OF UTAH, this 23rd day of March, 2009.

DISTRICT COURT CLERK

By Roxanne Baptist
Deputy Clerk

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF UTAH

show a violation of his constitutional rights which made his/her plea unknowing or involuntary). However, the Petitioner has alleged facts important enough to forward this claim to the Attorney General for review.

IX. Evidence Supporting the Charge of Aggravated Robbery

The Petitioner attacks the evidence in his case by making the following claims: (1) intent was not proven; (2) there was no evidence that he committed the crime; (3) his co-defendants had motive to implicate him; and (4) his confession was incompetent. "[B]y pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged . . . ." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989). The Petitioner waived his right to require the state to prove all of the elements of aggravated robbery when he entered a guilty plea. Therefore, the Court summarily dismisses this claim as facially frivolous.

X. Insufficient Factual Basis to Support the Petitioner's Guilty Plea

The Petitioner claims that the insufficient factual basis provided for his guilty plea violated his due process rights and the prosecutor's ethical duty. A violation of a prosecutor's ethical duty is an insufficient allegation to support a motion to vacate a guilty plea. Therefore, this claim is summarily dismissed. However, failing to make a record of facts sufficient to support a guilty plea is a violation of a defendant's due process rights. Willett v. Barnes, 842 P.2d 860, 862 (Utah 1992). Therefore, the Petitioner's claim is facially sufficient, so it will be forwarded to the Utah State Attorney General's Office for evaluation.

XI. Inaccuracies Contained in the Pre-Sentencing Investigation Report

The Petitioner also contends that he was unable to contest inaccuracies in his Pre-sentencing Investigation Report (PSI), because he never received a copy. Due process requires

that a defendant be provided with information being relied on by the Court for sentencing. State v. Casarez, 656 P.2d 1005 (Utah1982). Therefore, the Petitioner has stated a facially sufficient claim for relief, and the Court will forward it to the Office of the Attorney General.

XII. Ineffective Assistance of Counsel

The Petitioner claims he received ineffective assistance of counsel, listing approximately 25 reasons why his attorney's performance was deficient. To succeed on a claim for ineffective assistance of counsel, a petitioner must allege that counsel's performance fell below professionally competent assistance, and but for counsel's deficient performance, there is a reasonable probability that the proceeding's results would have been different. Strickland v. Washington, 466 U.S. 668, 690-694 (1984). Although the Petitioner failed to allege how these deficiencies prejudiced him, it is an issue sufficient to refer to the Attorney General for response.

XIII. Sufficiency of the Evidence and Vagueness

The Petitioner alleges that the behavior of which he is accused does not satisfy the elements of the aggravated robbery statute. First, the statute requires an intentional taking. The Petitioner asserts that this element requires proof of his identity–something which did not happen in this case. Second, the Petitioner states that robbery is the unlawful and intentional taking of personal property from their person or in his immediate presence by means of force or fear. The Petitioner references Black's Law Dictionary to show that the definition of "personal" means "pertaining to and limited to a person." The Petitioner uses his version of the robbery statute and his definition of "personal" to argue that the statute requires that the property which is taken, must be taken from the person who owns it. Since the property taken, in the robberies of which the Petitioner was convicted was owned by the store (not by the employees from whom it was

taken), the Petitioner argues that he is not guilty. Finally, the Petitioner, in an implicit acknowledgment that his argument hinges on his definition of personal, states that if someone can provide a different definition of "personal," the statute is unconstitutionally vague.

The Petitioner's claim that his guilty plea should be vacated, because the State did not provide proof of his identity is facially frivolous. "[B]y pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged. . . ." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989). When the Petitioner pleaded guilty, he admitted all essential elements of the crime. Therefore, this claim is summarily dismissed.

The Petitioner's argument that the property taken must be owned by the person from whom it is taken is facially frivolous. The robbery statute in effect at the time of the Petitioner's conviction reads, "[a] person commits robbery if . . . the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear. . . ." Utah Code Ann. § 76-6-302 (2003). The statute clearly outlaws the taking of personal property (property owned by a person) from a person who has possession of it. Therefore, the Petitioner's claim is summarily dismissed. Because the Court was able to resolve the Petitioner's claim without providing a different definition of "personal property," the Court will not address the Petitioner's constitutional vagueness argument.

ORDER

The following claims of the Petitioner are dismissed as facially frivolous.

1- There was no positive identification of the Petitioner by a victim as the statute requires.
2- The Petitioner was not advised of the bifurcated procedure used in aggravated crimes.
3- The Petitioner was denied his right to withdraw his guilty plea.

4- The Petitioner was never informed of his ability to withdraw his guilty plea.
5- The Petitioner was incorrectly told of the time limits for withdrawing his guilty plea.
6- A guilty plea may be withdrawn upon a showing of good cause or plain error or by a petition for post conviction relief.
7- The Petitioner's should have been told of his right to enter a conditional guilty plea.
8- The Petitioner's plea was unknowing, because he was not advised of his right to enter a conditional guilty plea.
9- The Petitioner's confession should have been excluded, because he was incompetent.
10- The Prosecutor violated the Petitioner's rights when he/she used the Petitioner's confession, obtained in violation of the constitutional, as a factual basis for the guilty plea.
11- The Court should have ordered an evaluation by the Department of Human Services.
12-The Court did not explain that the matrix calculation in the pre-sentencing investigation report was not binding
13-The Court did not explain it relinquishes jurisdiction to the Board of Pardons and Parole after sentencing.
14- The Court did not inform the Petitioner of all of the rights which he was waiving.
15- The evidence is insufficient to prove every element of aggravated robbery including intent.
16- The prosecutor violated his/her ethical duty to insure that there was sufficient evidence to charge the Petitioner with aggravated robbery.
17- The Prosecutor did not establish an intentional taking or a positive identification of the Petitioner.
18- The aggravated robbery statute requires proof that the property, taken during the robbery, was owned by the person from whom it was taken.

The following claims by the Petitioner are not facially frivolous.

1- The Petitioner was not told that the elements of aggravated robbery include a taking, of personal property, from a person or in his immediate presence.
2- The Petitioner's plea was not informed of how the law related to the facts.
3-The Petitioner was not advised of every element of the crime.
4- The Petitioner was not advised that the State had the burden of proving every element of the crime.
5- The Petitioner was not informed of the right to appeal.
6- The Petitioner's attorney should not have considered his confession in deciding to recommend that the Petitioner plead guilty.
7- The Petitioner's guilty plea was unknowing, because was incompetent at the time he entered the guilty plea.
8- The Petitioner was so incompetent, he was not able to enter any type of plea.
9- The Court incorrectly determined competency.
10- The Court did not correctly follow the procedure to establish whether the Petitioner was competent when it did not hold a hearing or obtain evaluations from mental experts.

11- The Court did not explain that the Petitioner would have to be in prison for at least five years before he would be eligible for parole or that he could be imprisoned for life.
12- The Court did not strictly comply with Rule 11(e).
13- There was an insufficient factual basis for the plea.
14- The Petitioner did not receive a copy of the pre-sentence investigation report.
15- The Petitioner received ineffective assistance of counsel.

The Office of the Attorney General will ensure that the Court receives a response to these claims within the time specified by Utah R. Civ. P. 65C(i).

The Petitioner's assertion of his right to withdraw his guilty plea pursuant to Rule 11(f) is denied. If the Petitioner submits a motion to withdraw his guilty plea asserting that he was not told of the time limits to withdraw his plea and the impact thereof, the Court will then review that issue.

DATED this 16 day of May, 2006.

ROGER S. DUTSON
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I HEREBY certify that I mailed a true and correct copy of the foregoing Ruling and Order as well as the Ruling and Order dated September 13, 2005 which was vacated by this ruling via first-class mail, postage prepaid to the following parties this 16 day of May, 2006:

Aaron Helbach
Petitioner/Defendant
Central Utah Community Correctional Center
P.O. Box 550
Gunnison, UT 84634

Christopher Ballard
Utah Attorney General's Office
160 East 300 South
P.O. Box 140856
Salt Lake City, Utah 84114-0856

LAW CLERK

SECOND DISTRICT COURT - OGDEN
STATE OF UTAH

AARON L HELBACH Petitioner	CLERK'S CERTIFICATE
vs.	Case No: 060900429 RN
STATE OF UTAH Defendant	Appellate No:

STATE OF UTAH)
: ss.
COUNTY OF WEBER)

I, ROXANNE BAPTIST, Deputy Clerk of the District Court of the SECOND DISTRICT COURT - OGDEN, State of Utah, do hereby certify that the foregoing and hereunto attached papers and file constitute all of the original papers filed in the above-entitled Court and cause, including the Notice of Appeal and Minute Entries, and which attached papers constitute the Judgment Roll and other papers filed in the above action.

I further certify that the Judgment Roll and papers contained in said file or by me this day transmitted to the Appellate Court, of the State of Utah, pursuant to said Appeal.

WITNESS MY HAND AND SEAL of said District Court at my office in SECOND DISTRICT COURT - OGDEN, STATE OF UTAH, this 23rd day of March, 2009.

DISTRICT COURT CLERK

By Roxanne Baptist
Deputy Clerk

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF UTAH

Case: 060900429 SECOND DISTRICT COURT - OGDEN Appellate #20080951

HELBACH, AARON L vs. STATE OF UTAH

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UTAH APPELLATE COURTS
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Document Title	Entry Date	Page Number
SEALED) PSYCHOLOGICAL EVALUATION	06/18/2003	001
MOTION TO VACATE DISMISSAL OF PETITION AND RE-INSTATE PETITION	12/30/2005	002
PETITION FOR RELIEF (VERIFIED)	01/25/2006	012
MEMORANDUM DECISION	01/25/2006	193
MEMORANDUM DECISION AND ORDER FOR SUMMARY DISMISSAL	01/25/2006	197
CERTIFICATE OF REMAILING	01/25/2006	206
COPY OF DOCKET	01/25/2006	207
RULING AND ORDER	05/18/2006	208
MOTION FOR ENLARGEMENT OF TIME AND ORDER	08/23/2006	225
MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA	01/17/2008	231
LETTER FROM BRETT DELPORTO	01/31/2008	237
ANSWER	01/31/2008	238
STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF	02/11/2008	248
MOTION TO CORRECT COURT RECORD AND PETITIONER'S PLEADING	03/10/2008	370
NOTICE TO SUBMIT	04/25/2008	372
MEMORANDUM	05/27/2008	375
MOTION FOR EXTENSION OF TIME	06/16/2008	377
ORDER GRANTING EXTENSION OF TIME	06/27/2008	379
LETTER FROM AARON HELBACK	09/05/2008	381
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF	10/06/2008	383
Notice of Appeal	10/31/2008	398
Mailing Certificate	11/07/2008	400
Supreme Court Order	11/21/2008	401
Supreme Court of Utah Letter	11/21/2008	403
Letter from the plaintiff.	11/26/2008	405
Utah Court Appeal Letter #20080951 CA	12/18/2008	406

STATE OF UTAH
COUNTY OF WEBER } SS.

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL ON FILE IN MY OFFICE

DATED THIS 23rd DAY OF March 2009

CLERK OF THE COURT

BY LeAnne Bayles DEPUTY

STATE OF UTAH DISTRICT COURT OGDEN

Ex 2

order of dismissal 6/13/08
(date as prepared)

BRETT J. DELPORTO (6862)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorneys for Respondent
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

AARON HELBACH, Petitioner, vs. STATE OF UTAH, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF** Case No. 060900429 Judge Roger S. Dutson

By Memorandum dated May 21, 2008, this Court granted the State's Motion to Dismiss Petition for Post-Conviction Relief. Now being fully advised, the Court enters the following findings of fact, conclusions of law, and order dismissing the petition for post-conviction relief.

FINDINGS OF FACT

1. On March 21, 2003, petitioner was charged in Second District Court, Weber County, with three counts of aggravated robbery in three separate informations.

See case nos. 031901411, 031901412 and 031901413 ("the Weber County cases"). In case no. 031901411, it was alleged that petitioner, claiming to have a gun, robbed an Arby's restaurant on February 14, 2003. In case no. 031901412, it was alleged that petitioner, claiming to have a knife, robbed a Sinclair station on March 11, 2003. Petitioner was also charged in the Second Judicial District Court in Davis County with two armed robberies of convenience stores that occurred on February 13, 2003. *See* case no. 031700453 ("the Davis County case").

2. Petitioner ultimately pleaded guilty to a total of three counts of aggravated robbery. On April 7, 2003, petitioner pleaded guilty to one count of aggravated robbery in the Davis County case and the other count of aggravated robbery in that case was dismissed pursuant to a plea bargain. On August 18, 2003, petitioner pleaded guilty to two counts of aggravated robbery in the Weber County cases

3. In exchange for petitioner's guilty plea to two counts of aggravated robbery in the Weber County cases (case nos. 031901411 and 031901412), the State agreed to dismiss the third count (case no. 031901413) and to recommend that any prison term be imposed concurrently with any term imposed in the Davis County case.

4. During the August 18, 2003, change-of-plea hearing in the Weber County cases, the contents of the Plea Statement were incorporated into the record through a colloquy among the Court, the petitioner and defense counsel.

5. On September 8, 2003, petitioner was sentenced to two terms of five years to life at the Utah State Prison.

6. Petitioner filed no timely appeal.

7. On March 5, 2004, petitioner filed a pleading in the Weber County criminal cases captioned "Motion to be Re-Sentenced Nunc Pro Tunc" in which he claimed *inter alia* that his plea was improperly and involuntarily entered due to mental illness. This Court denied the motion by order dated July 11, 2004.

8. On August 9, 2004, petitioner filed a "Notice of Appeal."

9. On November 2, 2004, the Utah Court of Appeals dismissed the appeal. The appeals court noted that petitioner's motion to be resentenced was "in substance" a motion to withdraw his plea, which must be filed before sentencing. Because petitioner's motion to withdraw his plea was filed months too late, the trial court had no jurisdiction to consider it and the court of appeals had no jurisdiction over the appeal.

10 Petitioner next attempted to challenge his convictions in the Weber County cases by filing a petition for extraordinary relief under rule 19, Utah Rules of Appellate Procedure, which also sought habeas corpus relief under appellate rule 20.

11. The Utah Court of Appeals denied that petition, explaining that rule 19 requires that "no plain, speedy or adequate remedy exists," but that petitioner had such a remedy available under rule 65C, Utah Rules of Civil Procedure. The court referred the petition to the Second Judicial District Court to the extent that it raised issues for review under the Utah Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 –110 (West 2004), and rule 65C, Utah Rules of Civil Procedure.

12. In evaluating petitioner's claims under the PCRA, this Court initially denied the requested relief and dismissed the petition in its entirety. However, the Court later reconsidered, agreed to allow some of petitioner's claims to go forward and ordered the State to file a response.

13. Meanwhile, the Second Judicial Court, Davis County, dismissed virtually identical claims petitioner made in the post-conviction challenge to his guilty plea in the Davis County case. Petitioner appealed that dismissal and, on June 1, 2007, the Utah Court of Appeals affirmed the denial of post-conviction relief. *Helbach v. State*, 2007 UT App 191 U, ¶ 2 (Memorandum Decision).

14. The State filed a Response to the petition challenging petitioner's convictions in the Weber County cases, requesting that it be dismissed.

15. On May 21, 2008, this Court granted the State's motion to dismiss.

CONCLUSIONS OF LAW

1. In the post-conviction petition, petitioner claim his plea was invalid due to violations of rule 11, Utah Rules of Criminal Procedure, as well as other alleged violations of rules governing the entry of guilty pleas.

2. Petitioner's claims fail to the extent that he alleges only technical violations of rule 11 governing the entry of guilty pleas because he has failed in his burden to demonstrate that his plea was *in fact* involuntary. *Bluemel v. State*, 2007 UT 90, ¶ 18, 173 P.3d 842; *accord Salazar v. Warden, Utah State Prison*, 852 P.2d 988 (Utah 1993).

3. Under the correct post-conviction review standards, petitioner cannot demonstrate that his plea was unknowing or involuntary because such claims are contradicted by petitioner's Plea Statement, in which he affirms that he was entering his guilty plea freely and without duress, as well as petitioner's testimony during his change-of-plea hearing, during which petitioner affirmed that he understood and accepted the terms of the plea agreement and that he was doing so knowingly and voluntarily.

4. Petitioner's also claims that he was not advised of the elements of aggravated robbery or of how his conduct met those elements. These claims are also contradicted by the record. In the Plea Statement, petitioner also fully acknowledged the elements of the aggravated robbery and the factual basis for the plea: "I unlawfully and intentionally took or attempted to take personal property from another by the threatened use of a gun."

5. The Plea Statement also states:

> I stipulate and agree . . . that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty . . . pleas and prove the elements of the crime(s) to which I am pleading guilty: On 2-14-2003 and 3-11-2003 I attempted to take property from (1) Arby's and (2) D. Magoon by use of a gun (1) and a knife (2).

6. In addition, the trial court also reviewed the elements in more detail during the plea colloquy to ensure petitioner understood.

7. Petitioner also claims he was not advised that, if he went to trial, the State had the burden of proving every element of the crime. However, the Plea Statement

explicitly states: "At a trial, the State would have the burden of proving each element of the charge beyond a reasonable doubt."

8. Petitioner next complains that he was not advised of his right to appeal. Because petitioner pleaded guilty, he explicitly waived his right to appeal. If petitioner wished to appeal, he would first have to timely move to withdraw his plea. The Plea Statement advised petitioner that if he wished to withdraw his plea, he must file a written motion before sentencing. Petitioner did not do so. Thus, he effectively had no appellate rights once he entered his guilty plea.

9. Petitioner claims "the court never explained that I must be imprisoned for 5 years before being eligible for parole" and that he could be imprisoned for life. This claim is without merit. On the first page of the Plea Statement—the same statement petitioner has repeatedly affirmed having read and understood—petitioner acknowledges that "I am pleading guilty to the following crimes: . . . 2 (cts) Ag. Robbery," which may be punished by "MIN/MAX AND/OR MINIMUM MANDATORY" sentences of "5-life USP and [$]20,000 fine on each." Although expressed in abbreviated form, the language "5-life USP" clearly means that petitioner was pleading guilty to crimes that would result in a sentence at the Utah State Prison for a minimum of five years and up to life.

10. Petitioner claims that his plea was unknowing and involuntary because he was mentally incompetent at the time it was entered. He also claims the Court and his defense attorney erred in not discovering his incompetence and requesting a competency examination.

11. Under Utah law, "[n]o person who is incompetent to proceed shall be tried for a public offense." Utah Code Ann. § 77-15-1 (West 2004). Incompetence to proceed is defined as a defendant's "inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or. . . his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding." Utah Code Ann. § 77-15-2 (West 2004).

12. The Utah Supreme Court has held that "[a] trial court must hold a competency hearing when there is 'a substantial question of possible doubt as to a defendant's competency at the time of the guilty plea.'" *Jacobs v. State,* 2001 UT 17, ¶ 13, 20 P.3d 382 (citation omitted). In determining whether the trial court should have ordered a competency hearing, "only those facts that were before the [trial] court when the plea was entered" should be considered. *State v. Arguelles*, 2003 UT 1, ¶ 50, 63 P.3d 731.

13. In support of his alleged incompetence, petitioner offers reports from doctors, psychologists and criminal justice evaluators, which he claims show that he was incompetent to plead guilty. These reports, however illuminating they may be for purposes of illustrating petitioner's mental health issues, provide no reason to doubt his competence to plead guilty. The Utah Court of Appeals, which also evaluated the reports because defendant used them to support identical claims raised in his post-conviction challenge to his guilty plea in the Davis County case, concluded that the reports "assessed

18. However, because petitioner has offered no evidence to establish his incompetence, there is no reason to believe his attorney had any reason to think he was incompetent, especially when the record demonstrates that petitioner was attentive and responsive at the plea hearing. He also affirmed he was mentally competent and not under the influence of drugs or mental illness. Accordingly, petitioner has not demonstrated his attorney was ineffective in proceeding with the guilty plea.

19. Nor has petitioner offered any evidence to substantiate his claim that his attorney erroneously advised him to plead guilty, despite supposed evidence that petitioner's confession was coerced. To succeed on this claim, petitioner must first demonstrate that there was enough evidence to support a claim that the confession was coerced and that a motion to suppress would have been meritorious. *See United States v. Cieslowski*, 410 F.3d 353, 360 (7th Cir.2005) ("When the claim of ineffective assistance is based on counsel's failure to present a motion to suppress, we have required that a defendant prove the motion was meritorious."), *cert. denied*, 546 U.S. 1097 (2006).

20. The Utah Supreme Court has identified a non-exhaustive list of objective and subjective factors that should be employed to determine whether, under the totality of the circumstances, a confession was improperly coerced. *State v. Rettenberger*, 1999 UT 80, 984 P.2d 1009. "Objective" factors are potentially coercive interrogation techniques such as misrepresentations, the "false friend" technique and improper threats of punishment or promises of leniency. *Id.* at ¶¶ 20-32. "Subjective" factors include

characteristics of the defendant, such as age, maturity, intelligence and possible mental impairments that make a suspect susceptible to manipulation. *Id.* at ¶ 37.

21. Petitioner has offered no evidence whatsoever to support the existence of *any* factors, subjective or objective, as identified in *Rettenberger*. Rather, petitioner merely asserts that he was "manipulated" and that "the prosecution and defense played on my mental illnesses." He also claims that his counsel "failed to properly investigate the plea bargain," "failed to investigate and prepare a defense," "failed to make an independent investigation into the Weber County confessions . . ." and "failed . . . to suppress incompetent confession." But he provides no evidence or even specific examples to back up his claims. In short, petitioner offers nothing but his own self-serving and highly generalized allegations of coercion. Because petitioner has failed to offer any evidence or even any specific examples of improper police conduct, it is impossible for him to demonstrate that his attorney had any reason to question the admissibility of the confession.

22. Petitioner claims that the Presentence Investigation Report (PSIR) that was prepared for sentencing in his case was inaccurate. Further, he claims he did not receive the report until nine months after sentencing. These claims are meritless.

23. A court may order a pre-sentence report from the department of corrections if more information about the defendant is necessary for sentencing purposes. Utah Code Ann. § 77-18-1(5) (West 2004). When a report is requested, the department is required to provide the report to the *defendant's attorney* three working days before sentencing.

Utah Code Ann. § 77-18-1(6)(a). Any inaccuracies in the report should be resolved before sentencing if possible. *Id.* If inaccuracies cannot be resolved before sentencing, they should be brought to the attention of the sentencing judge, who may grant an additional ten working days to resolve the alleged inaccuracies. *Id.* If a party fails to challenge the report's accuracy at the time of sentencing, "that matter shall be considered to be waived." Utah Code Ann. § 77-18-1(6)(b).

24. The cover page of the PSIR lists its due date as May 14, 2003 and lists the sentencing date as May 19, 2003. Presumably, the report was available on its due date, which was well before the actual sentencing on September 8, 2003. At the time of sentencing, the report had been provided to the trial court—it was referred to repeatedly during the hearing—and presumably also to defense counsel. Although not explicitly stated, it is clear from the context that petitioner was also familiar with the contents of the PSIR. Because petitioner failed to point out any alleged inaccuracies at sentencing, any claims concerning the inaccuracies is waived. Utah Code Ann. § 77-18-1(6)(b).

25. Additionally, even if petitioner's claims were not waived, the report does not appear to be inaccurate. The only specific inaccuracy petitioner mentions concerns his claim he was in Youth Corrections "custody" from 1996 to 2001.

26. However, it is not clear how this comment is related to any alleged inaccuracy. The PSIR indicates that petitioner was placed in a Youth Corrections community program on July 7, 1996 for rape or sexual abuse of a child under 14 and that this status was continued on January 29, 1997 for assault. On September 22, 1997, he

was placed in a secure facility for lewdness and that status was continued on October 2, 1997, for sodomy on a victim under the age of 14. He was paroled on February 8, 2000 and Youth Corrections jurisdiction was terminated on May 29, 2001. Thus, petitioner was in fact under the *jurisdiction* of Youth Corrections from 1996 to 2001. If by "custody" petitioner means that he was incarcerated in a Youth Corrections facility from 1996 to 2001, then there may be a discrepancy. Still, it is unclear whether the report is inaccurate or whether the apparent discrepancy is simply due to a difference in terminology.

27. More fundamentally, even assuming that petitioner has identified inaccuracies in the report, he has failed to demonstrate how any inaccuracy prejudiced him in any way. Petitioner has not claimed that he did not commit any of felonies listed in the PSIR; rather, he only seems to take issue with his custody status from 1996 to 2001. Because this alleged inaccuracy had no apparent impact on the court's decision—and defendant has not suggested how it could have affected the court's decision—petitioner cannot show any prejudice. Accordingly, this claim is without merit.

ORDER

Based on the motions, memoranda and other pleadings filed by both parties, and based on the arguments of counsel and petitioner, and because there is good cause for doing so,

IT IS HEREBY ORDERED:

The State's motion to dismiss the petition for post-conviction relief is GRANTED. The petition's claims are DENIED and DISMISSED WITH PREJUDICE and the Court DENIES post-conviction relief on all claims.

Under the Post-Conviction Remedies Act, "[a]ny party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction." Utah Code Ann. § 78-35a-110 (West 2004).

DATED this _____ day of June, 2008.

BY THE COURT:

_____

Judge Roger S. Dutson
Second Judicial District Court Judge

Mailed to Aaron Helbach on June 5, 2008
Submitted to the Court on June 13, 2008, by
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
Brett J. DelPorto
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Brett J. DelPorto
Assistant Attorney General
Attorneys for Respondent

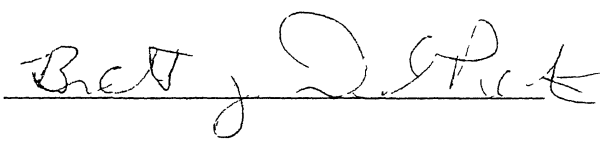
APPROVED AS TO FORM:

Aaron L. Helbach #34774
CUCF
PO Box 550
Gunnison, Utah 84634

CERTIFICATE OF SERVICE

I hereby certify that on the 13TH day of June, 2008, I served a copy of the foregoing by causing the same to be mailed, via first class mail, postage prepaid, to the following:

Aaron L. Helbach #34774
CUCF
PO Box 550
Gunnison, Utah 84634



Ex 3

Mental Health Records
Army discharge Papers for Mental Health discharge

pab ENTRANCE PHYSICAL STANDARDS BOARD (EPSBD) PROCEEDINGS			DATE 09/17/2001
1. NAME OF SERVICEMEMBER (Last, first, MI) HELBACH, AARON L		2. SSN 20529355702	3. GRADE E1
4. MEDICAL TREATMENT FACILITY GLWACH Fort Leonard Wood, MO 65473	5. COMPONENT RA	6. ORGANIZATION ~~43RD AG~~ D 2/10	7. DATE ENTERED CURR TOUR OF AD 28 Aug 01

FINDINGS BY THE EVALUATING PHYSICIANS

8. After careful consideration of medical records, laboratory findings, and medical examination, the board finds that the servicemember was medically unfit for appointment or enlistment in accordance with current medical fitness standards and in the opinion of the evaluating physicians the condition(s) existed prior to service. The member has the following medical conditions and/or physical defects (brief narrative summary).

IDENTIFYING DATA: The patient was a medical referral as a 19-year-old Caucasian male, currently single, with a 12th grade education, MOS 63M, currently in his first week of basic training, who presents with visual hallucinations of seeing a furry animal behind a wall locker.

HISTORY OF PRESENT ILLNESS: The patient relates he has a significant past psychiatric history with a diagnosis of bipolar disorder and schizotypal personality disorder, as well as ADHD. The patient relates he has been overwhelmed since coming to the military. He is experiencing depressed mood all day long, decreased sleep, some hopelessness, decreased concentration, decreased energy, decreased appetite and mild to moderate suicidality with a desire to go home; however, he has no significant plan. The patient denied any manic symptoms. The patient relates having significant anxiety with fear, some paresthesias, diaphoresis, chills and derealization. The patient denied any significant obsessive-compulsive symptoms or PTSD symptoms. The patient relates the primary perceptual disturbance is of visual hallucinations of seeing a furry animal. The patient, however, has had auditory and visual hallucinations since the age of 11.

PAST PSYCHIATRIC HISTORY: The patient relates being treated at an early age for ADHD, at 6 to 7 years old, treated with Ritalin until the age of 13. The patient began hearing whispering noises, seldom full speech, and seeing some visual hallucinations, primarily described illusions. The patient had been treated on multiple medications to include Risperdal, Zoloft, Prozac, Wellbutrin, lithium, Depakote and Ritalin. The patient was never hospitalized. The patient, however, was seen approximately 75 times in the last 6 to 10 years. The patient related he did have one suicidal gesture of cutting his wrists approximately a year ago. The patient related being raped at the age of 7 by an 18-year-old male. The patient related no alcohol or drug history with his last drink at age 15. The patient was first sexually active essentially with a rape at the age of 7; however, he has had unprotected sex since. The patient was enuretic until age 16. He has had a history of lying and firesetting. There is a family history of father with bipolar disorder; however, he does not know of anyone else.

PAST MEDICAL HISTORY: The patient relates having hernia surgery previously. He is currently on ibuprofen and has NO KNOWN DRUG ALLERGIES. The patient relates he, at this time, has some GI discomfort, chest tightness and stomachaches. However, this appears to be related to his anxiety. There is a family history of a grandfather who died of lung cancer.

PAST PERSONAL HISTORY: The patient was born and raised in Utah. His parents divorced. He is the second of three siblings. The patient related there was a great deal of yelling and beating in his family. The sexual abuse was reported as above. No treatment was given and no legal action was taken because he did not tell. The patient relates obtaining a 12th grade education with a 3.4 GPA with no college. He related he was in no remedial classes and was in advance classes. The patient relates he has few friends, a lot of acquaintances. He is currently living with his mother and stepfather. The patient relates having 3 jobs in the past, all lasting about a year-and-a-half. He quit one and was fired from one job. The patient is Mormon and relates his religion is important to him. The patient's activities include computer and basketball.

MILITARY HISTORY: The patient is in his first week of basic training.

MENTAL STATUS EXAM: The patient's appearance was typical with no significant concern in look. He did not have laces due to his unit watch. The patient was well developed, well nourished, with good hygiene. The patient appeared to be cooperative. His behavior was normal overall. Speech was of regular rate, rhythm and tone. The patient's mood was "terrible". The patient's affect did not appear to be as significant. He seemed to have good range regulation, and it was moderately congruent to mood. He seemed slightly anxious. His thoughts were clear, logical and goal directed. The patient was not having any active auditory hallucinations or suicidal or homicidal ideations. The patient denied any delusions. The patient related he had that one episode of seeing a furry animal behind his wall locker and seems to be more agitation and worried that this is going to get worse. The patient was alert and oriented x4, and his cognition was intact to recent and remote memory, concentration and attention. The patient's intelligence appeared to be above average. The patient's abstraction was slightly

concrete. Insight and judgment appeared to be good, and reliability appeared to be good due to his getting attention for his past psychiatric history. The patient relates the recruiter told him not to tell anyone.

ASSESSMENT: The patient is an 18-year-old Caucasian male with a past psychiatric history of a mood disorder described as bipolar disorder with schizotypal personality traits, as well as ADHD. The patient is having subtle, yet not significantly emergent symptoms at this time. The patient, however, does not meet retention requirements for further military duty.

DIAGNOSES:
1. (Axis I) Bipolar disorder, NOS.
History of attention deficit hyperactivity disorder.

2. (Axis II) History of schizotypal personality disorder.

3. (Axis III) No current diagnosis.

RECOMMENDATIONS: It is recommended that this patient be separated for an EPTS condition which is disqualifying for enlistment under the provisions of AR 40-501, chapter 2-32. The soldier is recommended to be transferred to the RHU. The soldier is qualified for pay purposes. The soldier should be removed from further basic training.

P U L H E S
1 1 1 1 1 3

2. STATE PROFILE AND ASSIGNMENT LIMITATIONS
Soldier is relieved from all basic training duties pending a medical separation. CODE: U

3. TYPE NAME, GRADE, & SPECIALTY OF PHYSICIAN(S) /DENTIST(S)	4. SIGNATURE(S)
CHRISTIAN DeGREGORIO, MAJ, MC, C, Psych Service	
J. MARK KIRK, COL, MC, C, Beh Med Div	

ACTION BY APPROVING AUTHORITY

5. THE FINDINGS ARE
☒ APPROVED ☐ DISAPPROVED (State reason in continuation section on reverse. (Identify by item NO.)

6. TYPED NAME, GRADE & TITLE OF MEDICAL APPROVING AUTHORITY	14. SIGNATURE	15. DATE
MICHAEL A. DEATON, LTC, MC, DCCS		22 Sep 01

16. TO: *COMMANDER OF SERVICEMEMBER*	17. FROM: *MFT COMMANDER*
43RD AG FORT LEONARD WOOD, MO 65473	MEDDAC FORT LEONARD WOOD, MO 65473

FORWARDED FOR NECESSARY ACTION

18. TYPED NAME, GRADE & TITLE OF MFT COMMANDER	19. SIGNATURE	20. DATE
MICHEAL A. DEATON, LTC, MC, DCCS	Brenda Todd BRENDA TODD, PEBLO	24 Sept 2001

ACTION BY SERVICEMEMBER

21. I have been informed of the medical findings. Additionally, I understand that legal advice of an attorney employed by the Army is available to me or that I may consult civilian counsel at my own expense. I also understand that I may request to be discharged from the US Army without delay or to request retention on active duty. If retained, I may be involuntarily reclassified into another military occupational specialty based upon my medical condition.

☒ I concur with these proceedings and request to be discharged from the US Army without delay.

☐ I concur with these proceedings and request that I be retained on active duty.

☐ I disagree with these proceedings because my condition did not exist prior to service (specific medical evidence is attached) and request my case be returned to the medical approving authority for reconsideration.

☐ I disagree with these proceedings because my condition was not disqualifying on entry and was aggravated by service (specific medical evidence is attached) and request my case be returned to the medical approving authority for reconsideration

22. TYPED NAME & GRADE OF SERVICEMEMBER	23. SIGNATURE	24. DATE
HELBACH, AARON L*		20010925

ACTION BY UNIT COMMANDER

25. RECOMMEND Soldier has not completed BT, or 8 weeks of OSUT.

- ☒ SERVICEMEMBER BE DISCHARGED/SEPARATED
- ☐ SERVICEMEMBER BE RETAINED
- ☐ CASE BE RETURNED TO MEDICAL APPROVING AUTHORITY

26. TYPED NAME, GRADE & TITLE	27. SIGNATURE	28. DATE
ERIC D. BROWN, CPT, IN, Commanding	Eric D Brown	25 Sep 01

ACTION BY DISCHARGE AUTHORITY

29. SERVICEMEMBER WILL BE

- ☒ DISCHARGED/SEPARATED FROM THE ARMY
- ☐ RETAINED ON ACTIVE DUTY

30. TYPED NAME, GRADE & TITLE	31. SIGNATURE	32. DATE
DUANE T. RACKLEY, Colonel, Infantry Commanding		26 Sep 01

Ex. 4

Darette Colemans statement she had
Appellants pills in her purse
(To prove mental condition on the streets)

I have been moved so many times since my incarceration that I have misplaced this document. I will send it in as soon as I can get a copy of it.

Ex 5

Weber Co. Plea Agreements

THE PUBLIC DEFENDER ASSOCIATION, INC.,
OF WEBER COUNTY, STATE OF UTAH
2562 Washington Boulevard
Ogden, Utah 84401
Telephone (801)392-8247
Fax (801)334-7275

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH

Plaintiff,

vs.

Aaron Helbach

Defendant.

STATEMENT OF DEFENDANT
IN SUPPORT OF GUILTY PLEA
AND CERTIFICATE OF COUNSEL

Case No. 031901411 FS

Judge Dutson

AUG 19 2003

I, Aaron Helbach, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights;

NOTIFICATION OF CHARGES

I am pleading guilty (or no contest) to the following crimes:

	CRIME & STATUTORY PROVISION	DEGREE	PUNISHMENT MIN/MAX AND/OR MINIMUM MANDATORY
A.	2(aTS) Ag. Robbery	1st.	5-life USP and $10,000 fine on each.
B.			
C.			
D.			

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the ~~elements~~ of the crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:

That I unlawfully and intentionally took or attempted to take personal property from another by fear/threatened use of a gun

I understand that by pleading guilty I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes.) I stipulate and agree (or, if I am pleading no contest, I do no dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the Court to accept my guilty (or no contest) pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

On 2-14-2003 and 3-1-2003 I (1) attempted to take property from Arby's and Domino's (2) by use of a gun (1) and a knife (2)

WAIVER OF CONSTITUTIONAL RIGHTS

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

COUNSEL: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me. I understand that I might later, if the Judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

If I have waived my right to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have **not** waived my right to counsel, my attorney is John T. Caine. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

JURY TRIAL. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES. I know that if I were to have a jury trial, a) I would have the right to see and observe the witnesses who testified against me and b) by attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

RIGHT TO COMPEL WITNESSES. I know that if I were to have a jury trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of the witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

RIGHT TO TESTIFY AND PRIVILEGE AGAINST SELF-INCRIMINATION. I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, *no* on could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF. I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty" and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

APPEAL. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest).

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

CONSEQUENCES OF ENTERING A GUILTY (OR NO CONTEST) PLEA

POTENTIAL PENALTIES. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eight-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

CONSECUTIVE/CONCURRENT PRISON TERMS. I know that if there is more than one crime involved, the sentence may be imposed one after the other (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the Court to impose consecutive sentences unless the Court finds and states on the record that consecutive sentences would be inappropriate.

PLEA BARGAIN: My guilty (or no contest) plea(s)(is/are not) the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea bargain, if any, are fully contained in this statement, including those explained below:

(1) STATE DISMISSES 1 CT Ag Robbery 1st° felony
(2) STATE Recommends Concurrent Sentence with each other and DARS Court

TRIAL JUDGE NOT BOUND. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecution attorney are not binding on the Judge. I also know that any opinions they express to me as to what they believe the Judge may do are not binding on the Judge.

DEFENDANT'S CERTIFICATION OF VOLUNTARINESS

I am entering this plea of my own free will and choice. No force, threats or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its

contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am 21 years of age. I have attended school through the 12 Grade. I can read and understand the English Language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgement when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgement.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I will be allowed to withdraw my plea only if I show good cause. I will not be allowed to withdraw my plea after sentencing for any reason.

DATED this 18 day of August, 2003

DEFENDANT

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for Aaron Heldaas, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

ATTORNEY FOR DEFENDANT
BAR NO. 0536

5

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against _____ _____, defendant. I have reviewed this statement of defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.

Brenda D. Braton

PROSECUTING ATTORNEY
BAR NO. 6832

ORDER

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and base on any oral representations in Court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

DATED this _____ day of _____, 200____.

_____
DISTRICT COURT JUDGE

THE PUBLIC DEFENDER ASSOCIATION, INC.,
OF WEBER COUNTY, STATE OF UTAH
2562 Washington Boulevard
Ogden, Utah 84401
Telephone (801)392-8247
Fax (801)334-7275

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. Aaron Helbach Defendant.	STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY PLEA AND CERTIFICATE OF COUNSEL Case No. 031901412 FS Judge Dutson AUG 19 2003

I, Aaron Helbach, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights;

NOTIFICATION OF CHARGES

I am pleading guilty (or no contest) to the following crimes:

	CRIME & STATUTORY PROVISION	DEGREE	PUNISHMENT MIN/MAX AND/OR MINIMUM MANDATORY
A.	2(@TS) Ag. Robbery	1st F.	5-life USP and $10,000 fine each.
B.			
C.			
D.			

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the ~~elements~~ of the crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:

That I unlawfully and intentionally took or attempted to take personal property from another by fear induced by threatened use of a gun

I understand that by pleading guilty I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes.) I stipulate and agree (or, if I am pleading no contest, I do no dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the Court to accept my guilty (or no contest) pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

On 2-14-2003 and 3-1-2003 I (1) attempted to take property from A.B. and D.L. (2) by use of a gun (1) and a knife (2)

WAIVER OF CONSTITUTIONAL RIGHTS

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

COUNSEL: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me. I understand that I might later, if the Judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

If I have waived my right to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have not waived my right to counsel, my attorney is John T. Caine. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

JURY TRIAL. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES. I know that if I were to have a jury trial, a) I would have the right to see and observe the witnesses who testified against me and b) by attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

RIGHT TO COMPEL WITNESSES. I know that if I were to have a jury trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of the witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

RIGHT TO TESTIFY AND PRIVILEGE AGAINST SELF-INCRIMINATION. I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, *no* on could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF. I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty" and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

APPEAL. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest).

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

CONSEQUENCES OF ENTERING A GUILTY (OR NO CONTEST) PLEA

POTENTIAL PENALTIES. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eight-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

CONSECUTIVE/CONCURRENT PRISON TERMS. I know that if there is more than one crime involved, the sentence may be imposed one after the other (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the Court to impose consecutive sentences unless the Court finds and states on the record that consecutive sentences would be inappropriate.

PLEA BARGAIN: My guilty (or no contest) plea(s)(is/are not) the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea bargain, if any, are fully contained in this statement, including those explained below:

(1) STATE Dismisses 1 CT Ag Robbery 1st° felony
(2) STATE Recommends Concurrent Sentence with each other and DARS Court

TRIAL JUDGE NOT BOUND. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecution attorney are not binding on the Judge. I also know that any opinions they express to me as to what they believe the Judge may do are not binding on the Judge.

DEFENDANT'S CERTIFICATION OF VOLUNTARINESS

I am entering this plea of my own free will and choice. No force, threats or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its

contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am 21 years of age. I have attended school through the 12 Grade. I can read and understand the English Language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgement when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgement.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I will be allowed to withdraw my plea only if I show good cause. I will not be allowed to withdraw my plea after sentencing for any reason.

DATED this 18 day of August, 2003

DEFENDANT

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for Aaron Weldon, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

ATTORNEY FOR DEFENDANT
BAR NO. D536

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against _____ _____, defendant. I have reviewed this statement of defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.

Brenda D. Braton

PROSECUTING ATTORNEY
BAR NO. 6837

ORDER

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and base on any oral representations in Court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

DATED this _____ day of _____, 200____.

_____
DISTRICT COURT JUDGE

Ex 6

Change of Plea Transcripts from 8/18/2003

Improper Plea Colloquy

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

*****

STATE OF UTAH,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	REPORTER'S TRANSCRIPT
	)	
AARON LONNEL HELBACH,	)	PLEA
	)	
DEFENDANT.	)	CASE NOS. 031901411, 031901412
	)	031901413

*****

HONORABLE ROGER S. DUTSON

AUGUST 18, 2003

APPEARANCES

FOR THE PLAINTIFF: MS. BRENDA J. BEATON

FOR THE DEFENDANT: MR. JOHN T. CAINE

P R O C E E D I N G S

THE CLERK: For the record, this is State of Utah versus Aaron Lonnel Helbach, case numbers 031901411, 031901412, and 031901413. Time set for disposition.

MR. CAINE: This is Aaron Helbach, Your Honor. As you recall, this case had been continued over a bit because he had pled guilty to a first degree felony aggravated robbery in Davis County and had actually gone down on a diagnostic while these cases were pending. We've now received the diagnostic. He was sentenced by Judge Allphin to the five to life sentence.

Based upon that, I've talked with Mr. Parmley and we've reached a negotiation; that is, that he will plead guilty to two of the -- I think these are in separate files, actually, two first degree felony aggravated robberies. It's the case -- the first one is the -- just so that you have them -- is the case on the 14th of February 2003 where the victim is Arby's. And the second one is on 3/11/2003, the victim is listed as initial D. Magoon, capital, M-A-G-O-O-N.

In return for that, the third case will be dismissed. And the State -- we're going to ask to be sentenced today and the State will recommend concurrent sentences as between the two charges and with the Davis County case, and that's the negotiation.

THE COURT: All right. Is there a written plea

agreement?

MR. CAINE: There is.

THE COURT: And you understand what's in there, Mr. Helbach?

THE DEFENDANT: Yeah, I do.

THE COURT: What's your level of education?

THE DEFENDANT: Post high school tech school.

THE COURT: And you read and write and understand well?

THE DEFENDANT: Yes, sir.

THE COURT: Are you on any medications, alcohol, drugs or do you have any mental health condition today that would make it so you don't fully understand what's happening?

THE DEFENDANT: No, sir.

THE COURT: And are you satisfied with the legal representation you've received?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If you wish, you may go ahead and sign that.

MR. CAINE: Actually, he signed it earlier, I can affirm. We'll just a make a record, Your Honor.

Aaron, you and I reviewed this document and talked about this and it bears your signature and you just signed it in the lockup in there a minute ago; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: That is your signature? And do you waive or give up your preliminary hearing rights?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you've had the right to have preliminary hearings?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So that we have everything straight here.

MS. BEATON: We don't have restitution determined is one thing. And I don't know whether or not the victims in this case want to be heard given the nature of the fact that it's an aggravated robbery.

THE COURT: Right.

MS. BEATON: They may very well want to be heard.

THE COURT: They very well might. Let's -- now there were two involving --

MR. CAINE: Yeah. One on --

THE COURT: -- D. Magoon one on March the 5th and one on March the 11th.

MR. CAINE: The one on March 11th is the one we're going to plead to.

THE COURT: All right.

MR. CAINE: And then the Arby's case which is on the 14th of February.

THE CLERK: Can we specify case numbers so I get the

--

THE COURT: Yes, I will.

MS. BEATON: We'll be dismissing case ending in 1413 and the defendant will be pleading to case ending 1412 and 1411.

THE CLERK: Thank you.

MR. CAINE: That is correct.

THE COURT: All right. Now --

MR. CAINE: As far as -- I guess we probably ought to -- since this hasn't been raised before, as far as the restitution goes since I don't -- at least Mr. Parmley didn't indicate there had been any claim, I suppose what you can do is leave that for the Board of Pardons to determine.

THE COURT: We can address that.

MR. CAINE: Yeah.

THE COURT: But first then, so that we're clear on the elements under the most recent case from the Court of Appeals, we have to be very detailed on the elements. And I'll go over those again which may be somewhat duplicating what's in this written agreement but I want you to clearly understand what you're pleading to, what the elements are, and so I'm going to go over them with some more detail.

I'll ask first on the case of February the 14th on case number 1411, and that's the Arby's case, what would the elements have been had you gone to trial on that?

MS. BEATON: Do you want to state them?

MR. CAINE: This is -- they're all fairly similar. This is a case, this is a situation where the defendant went in there, he indicated that he had a weapon and attempting to get property, money in this case, and that's what happened.

THE COURT: Did he obtain property or just attempt to gain property at Arby's?

MR. CAINE: Yeah. He obtained the property.

THE COURT: Arby's he got some money or property from them threatening them with a weapon?

MR. CAINE: Money, yes.

THE COURT: All right. And on the 11th of March, D. Magoon, what are the -- that says it was a knife.

MR. CAINE: This is a -- this is a -- at least he indicated that he had done that. This is the -- at a Sinclair gas station actually. The individual was the person named there and there was a indication that he had a knife and there was money from there also.

THE COURT: And you got money then?

THE DEFENDANT: Yes, sir.

THE COURT: All right. So those then would be the elements that you did by use of force or fear a knife, and then in the other case, a gun, steal money from persons that you had no legal right to have. And you understand those are the elements?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Then to the Arby's theft in case number 1411, a robbery, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: And to the Sinclair robbery involving a victim by the name of D. Magoon, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Aggravated robbery. All right.

And the factual basis has been given to the Court which included these elements, and therefore, the Court finds there is a factual basis upon which to enter the pleas and they are entered. You have up to the time of any sentencing in which to attempt to withdraw your pleas in writing. And you wish to have sentencing today apparently?

MR. CAINE: We do.

THE COURT: You need to understand, Mr. Helbach, before we go ahead that I'm not bound by any recommendations as to any penalties. In other words, I don't have to follow the recommendations to run them concurrent and they could run consecutive to any other penalties. Do you understand that?

THE DEFENDANT: I do understand that, Your Honor.

THE COURT: All right. You have the right to come back after two days for sentencing and normally within 45 days if the Court's calendar permits to have sentencing. And normally I would refer the matter to the Adult Probation

Department for some recommendation. Do you understand that?

THE DEFENDANT: Yes, sir.

MS. BEATON: Judge, the State's problem with doing sentencing today is, one, restitution has not been determined. Two, the victims in these cases have not been notified of the plea negotiation that was entered into, and obviously, not have had an opportunity to let the Court know what their feelings are.

Although case number 1413 has been dismissed, that victim is the victim on the first instance and the victim on the second instance. And she submitted a victim impact statement that indicates that she clearly has an opinion as to what ought to happen in this case, and I just don't see how the defendant is harmed in any fashion by waiting.

THE COURT: All right. I tend to agree, although I do have a presentence report with the diagnostic evaluation of some sorts. Actually, it's not a presentence, it's just a diagnostic.

MS. BEATON: I don't think Mr. Parmley had anticipated that sentencing would take place today.

THE COURT: I'm not -- I think it would be better for me to know what the facts are and whether the State remains silent or not isn't the issue. I'm going to refer it because of the seriousness of the offenses for presentence.

MR. CAINE: Well, that -- okay. I'm going to now

I'm in a position -- number one, let me make the record. Mr. Parmley did know it.

Number two, it makes no sense at all to have a presentence report. You have a diagnostic report and that's what we were working on. I don't care if we continue it to let the victim come in, that's all right with me. It makes no sense at all to have another diagnostic report. And this is not a situation where the State -- the State -- he knows he's going to prison, and the State is making an affirmative recommendation for a concurrent sentence.

THE COURT: Right.

MR. CAINE: And I think that's where it ought to be. I don't have any problem with giving a victim an opportunity to speak, but the victim -- all the victim can ask for is a prison sentence, and that's all we're doing.

THE COURT: What I'm going to do then is continue this to allow the time for the victims to come in and ask that the presence recommendations that have been made in Davis County be provided.

MR. CAINE: That's fine. I don't have any problem with that.

MS. BEATON: Well, maybe if they can determine a restitution figure.

MR. CAINE: Yeah. If we've got a restitution --

THE COURT: If we could get a restitution figure,

that would be helpful.

MR. CAINE: That's fine.

THE COURT: How long do you need? Two weeks? We've got a holiday on the 1st. Let's set it for the -- and I'm really heavy on the 8th. Let's set it for the 15th. And that's simply because my calendar is so bad. If that's good for you, fine; if not, let's talk --

MR. CAINE: The only problem with that day is -- well, I'm sure one of my colleges can be here. I start a jury trial here with --

THE COURT: Would you be available on the 8th, Mr. Caine?

MR. CAINE: The 8th of September?

THE COURT: Uh-huh. It's getting to be quite heavy but --

MR. CAINE: Let's see. Yes, I would.

THE COURT: All right. Let's set it for the 8th.

MR. CAINE: All right.

THE COURT: September the 8th then.

MR. CAINE: That will be fine.

THE COURT: All right. Thank you. All right.

(The matter concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
: SS.
COUNTY OF WEBER)

I, Tracy A. Covington, do certify that I am a Registered Professional Reporter and Official Court Reporter in and for the State of Utah; that I reported the proceedings of the above-entitled matter at the aforesaid time and place. That the foregoing proceedings were reported by me in stenotype using computer-aided transcription.

That the same constitutes a true and correct transcription of the said proceedings.

That I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

WITNESS my hand at Ogden City, Utah, this 25th day of January, 2007.

Tracy A. Covington, RPR

Ex 7

Statutes + Rules

Rule 65C. Post-conviction relief.

(a) Scope. This rule shall govern proceedings in all petitions for post-conviction relief filed under Utah Code Ann. § 78-35a-101 et seq., Post-Conviction Remedies Act.

(b) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(c) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(c)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(c)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(c)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(c)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(c)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(c)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(d) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(d)(1) affidavits, copies of records and other evidence in support of the allegations;

(d)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(d)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(d)(4) a copy of all relevant orders and memoranda of the court.

(e) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(f) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(g)(1) Summary dismissal of claims. The assigned judge s hall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(g)(2) A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(g)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(g)(2)(B) the claims have no arguable basis in fact; or

(g)(2)(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(g)(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the

 make the Court aware of interest in dismissal and not procedural 10/26/2007 10:02 AM

requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(g)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(h) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(i) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(j) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(j)(1) consider the formation and simplification of issues;

(j)(2) require the parties to identify witnesses and documents; and

(j)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(k) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(l) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(m) Orders; stay.

(m)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(m)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(m)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(n) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Section 64-13-23 and sections 78-7-36 through 78-7-43 govern the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(o) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Advisory Committee Notes